
CREDE MIHI
TRIA JUNCTA IN UNO
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one of His Majestys Counsel.

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THE HISTORY

OF THE

LAW OF PRIMOGENITURE IN ENGLAND

AND

ITS EFFECT UPON LANDED PROPERTY.

(BEING AN ESSAY WHICH, JOINTLY WITH ANOTHER, OBTAINED THE YORKE PRIZE OF THE UNIVERSITY OF CAMBRIDGE).

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Σοφῶν τε πλῆθος ἀθρόον ἀσθενέστερον
φαυλοτέρας φρενὸς αὐτοκρατοῦς
ἑνὸς, ὅ δύνασις ἀνά τε μέλαθρα κατά τε πόλιας.

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LEARNING.

ANALYSIS OF CONTENTS.

THE

History of the Law of Primogeniture in England

AND ITS EFFECT UPON LANDED PROPERTY.

I.—Anticipations of Primogeniture in England before the Norman Conquest.

Primogeniture had no place among the earliest inhabitants of our island. At Cæsar's landing, agricultural arts, and consequently all ideas of private property in land, were unknown to the mass of Britons. As civilisation spread among them, and land came to be cultivated and appropriated, a law of property was developed; but its usages as to succession took the form common to all Keltic races, and gave the inheritance to the male kinsfolk, recognising among them no priorities or preferences, although rigidly excluding females from any possibility of inheriting land. In earlier times the succession, doubtless, went to all the males of the clan. But when the conception of property grew more definite, and the rights of the family became distinct from those of the clan, the sons of the deceased proprietor became his only heirs. Yet the more primitive form of succession survived for many centuries in that more primitive state of society which prevailed across the Channel; and English jurists, to whom the early history of their own law was unknown, bestowed upon it the distinctive name of "*Irish* Gavelkind."

The rapid progress of Roman influence created a line of colonies and municipalities along the East and South; and the edict of Caracalla, by raising all his free British subjects to citizenship, carried the Roman law into native households. But however great were the changes thus effected, none of

them would tend to the introduction of Primogeniture. The tendency was, indeed, in the opposite direction; for Roman law, by establishing the equality of the sexes in intestate succession, and repudiating the idea of hereditary office, destroyed the only customs of Britain from which Primogeniture might in time have sprung.

Before discussing the further changes which Saxon invasions introduced, it will be convenient to continue the present branch of our subject into a somewhat later period, that we may see how the Keltic custom developed itself when not affected by violent interference from without.

The Britons who had taken refuge in the Welsh mountains retained their custom of partition amongst males, and originally applied it, not only to lands, but to chieftainship.* Less than two centuries before the Norman conquest, the Welsh crown passed from Roderick the Great to his three sons, Anarawd, Cadela, and Mervin, as co-heirs.† But with the Cymry, as with all other nations, a brief political experience sufficed to show the necessity of rendering the crown impartible. Hence, when we get our first detailed picture of Welsh life in the Laws of Howel Dda,‡ more than a century and a quarter before the Conquest, all trace of the old custom is gone from constitutional law, and the king's successor is always a single male kinsman. But this carries us little way towards Primogeniture; for the successor's right springs entirely from the king's nomination, and the king may nominate, as *edling*, whatever son, or even nephew, he may choose. His choice does, however, seem to have most frequently fallen upon his eldest son.

In Wales, in fact, unlike other countries, the tendency to Primogeniture, such as it was, is more marked in the law of property than in the law of office. Welsh land in Howel's time may be divided into two kinds. There is some which

* Powell's "History of Wales," p. 21, gives an instance, A.D. 811.

† Enderbie's "Cambria Triumphans," p. 217—quoting Mills' "Catalogue of Honour," p. 209.

‡ See the Record Commissioners' "Ancient Laws and Institutes of Wales," 1841; and Wotton's "Leges Wallicæ." Howel died A.D. 948.

has not yet become absolute property, but is held only by payment of *geld* to the king; and this is still under the control of the older custom, passing at the occupier's death to all the men of his *vill*. But there is also hereditary land —inalienable, indeed, for more than the owner's life, and undevisable, but partible at his death among his sons, and, when they in turn were dead, repartible among the grandsons, and again among the great-grandsons. "After that," says the code, "there is no appropriate share of land." So recent was the second form of partibility—so lately had "Welsh gavelkind" arisen out of "Irish gavelkind"—that the law will allow family descent only for three generations, and *agnati* more remote than second cousins look upon each other as merely *gentiles*. But even in this early stage, the Welsh law of succession has developed two rules which demand our attention.

One relates to the mode of making the partition among the heirs, and the preference to which the *youngest* son is, except in two cases, entitled. It appears thus in the Venedotian—the older—form of Howel's laws (Book II. cap. 12):—

"If there be buildings, the youngest brother but one is to divide the tyddyns,* for in that case he is the meter; and the youngest to have his choice of the tyddyns, and after that he is to divide all the patrimony. And by seniority they are to choose unto the youngest; and that division is to continue during the lives of the brothers."

But it is laid down that—

"If there be no buildings on the land, the youngest son is to divide all the patrimony, and the eldest is to choose; and each, in seniority, choose unto the youngest."

And (II. 16. 8) the second exception to the youngest's right is this:—

"Land of a hamlet is not to be shared as tyddyns, but as gardens; and if there be buildings thereon, the youngest son is not more entitled to them than the eldest, but they are to be shared as chambers."

The Dimetian Code—the form that Howel's laws assumed

* "Tyddyns" is translated "tenements" by the Record Commissioners' editor, and "ædificia" by the old Latin code. I learn from a Welsh philologist that, at any rate at the present day, the word (like "messuage" in the stricter sense) denotes a house that has a curtilage attached to it.

in South Wales—betrays its later date by its minuter provision (II. 23, 1):—

"When brothers share their patrimony between them, the younger is to have the principal tenement, and all the buildings, of his father, and eight *erws* of land; his boiler, his hatchet, and his coulter, because a father cannot give these three to any one but the youngest son, and though they should be pledged they never become forfeited. Then let every brother take an homestead with eight *erws* of land; and the youngest son is to divide, and they are to choose in succession from the eldest to the youngest."

The fact that the family house, whenever it was more than a village cot, fell to the youngest son is of great importance, for it shows the origin of the other rule which we have still to consider—a rule which carries us directly to Primogeniture.

Hitherto we have always found land partible, the partition being either "Irish" among the clan, or "Welsh" among the family. Both modes agree in limiting the partition to males; and they agree also—both being of Keltic and præ-Christian origin—in ignoring marriage, and admitting illegitimate as readily as legitimate kinsmen. The time came for the Church to protest against this, and we find in the Venedotian Code (II. 16, 2):—

"The ecclesiastical law says again that no son is to have the patrimony but the eldest born to the father by the married wife. The law of Howel, however, adjudges it to the younger son as well as to the oldest, and decides that the sin of the father, or his illegal act, is not to be brought against the son as to his patrimony."

The Welsh jurists saw their old law assailed in both its essentials—its admission of younger sons, and its admission of bastards. The Church* assailed the latter; but the Conservative lawyers, in the heat of defence, were perhaps mistaken in also attributing to her influence the simultaneous attack upon the former.† There a yet subtler

* The oldest MS. of this code omits the word "Ecclesiastical" altogether from the passage; but it is too often inaccurate for its omissions to have any authority against the consent of four other MSS.

† It is certain, however, that in the Isle of Man she did make an effort in that direction. A statute of 1643, indicating the equal right of all children to

adversary than she was at work. The same social necessities which made Primogeniture popular among feudal vassals in the England of the twelfth century were now at work to introduce it in Wales, though not aided there by the military advantages which in England recommended it also to those vassals' lords. The family finds its property in danger, and the safety of the property must be effected by its concentration. The danger arose, in the later English days, from political changes; but in Wales mere legal changes suffice to account for it. The family had but recently won from the clan the right to the more valuable inheritances; too recently for the change not to be resisted whenever circumstances might seem to favour the clansmen in an aggression upon the usurpers. The children would be ousted, the home broken up, the hearth extinguished. Then the ejected family must have recourse to law; they must sue for restitution of their patrimony, for *Dadenhudd*, the *Re-uncovering* of the fire on the father's hearth. At this juncture the law recognises the temporary importance of conjoint action; and for the purposes of the suit it combines the brothers under the headship of the eldest. As against their ejectors, they become a corporation. Thus the Dimetian Code (II. 21, 4) provides:—

"Of two lawful present heirs, one is proprietary heir to *dadenhudd* of the whole, and another is non-proprietor. The one, however, is proprietor to *dadenhudd* of the whole, as *dadenhudd* of the whole is not appropriate to any one except the eldest of all the brothers. The privilege of age of the eldest brother renders him sole proprietor for *dadenhudd* of all. . . . . All the younger brothers are non-proprietors as to obtaining *dadenhudd* of the whole, although every one shall obtain his share."

Another passage, perhaps of still later date, from another portion of the same code (II. 8, 107) supplements the rule by providing that if the eldest son die before a patrimony is shared, his *eldest* son shall take his place.

We might, at first sight, suppose this rule to be merely

the personalty, complains that, "contrary to this, the Church sometimes used to decree the whole team of oxen and the crop of corn to the eldest son; which commonly is more worth than all the rest of the goods."—Jeffcott's "Statute Laws of the Isle of Man."

the retention of an old, yet unabandoned, system of family government. But it is in the Dimetian code that the rule occurs. Moreover, we have already seen that the old Welsh law regarded not the eldest, but the youngest son as the especial representative of the household, and the perpetuator of the family hearth. Both facts show that we have here a new reform; the beginning of what under more favourable circumstances might have become a legal revolution.*

But the current of circumstance that had carried Wales thus far was not strong enough to carry her further, and confer upon the Pen-cenedl not merely the defence, but the dominion of his brothers' patrimony. It was only by foreign violence that Primogeniture, centuries afterwards, was forced upon her.

It is perhaps to clerical rather than to Saxon influence that we must attribute the temporary effort made in the Dimetian code (II. 23, 6) to admit women to a place in successions. Their brothers were to allow the sisters a *gwaddol*, or marriage portion, to consist apparently of cattle and furniture, and not exceed in value half a brother's share;† and, in default of brothers, they were to inherit the patrimony. Subsequent law allows a mother to be heir to her daughter.‡ But these reforms had no support in Welsh traditions or Welsh sympathies; the ancient laws, and some lawyers even at the time of the Venedotian code, had repudiated female succession (II. 15, 1). Hence we cannot wonder that when next the veil is raised from Welsh jurisprudence, at the time of the Statutum Walliæ, all traces of female rights have again vanished.§

The admission of females and the use of Testaments are

* This principle of *dadɨnhudd* reappears in the partitive descents of Jersey in the rule which makes the eldest son "Principal Heir," entitling him to hold for his own benefit till the other children claim *partage*.

† "Ancient Laws," p. 256, with p. 47. ‡ P. 617.

§ The Record Commissioners' editor lays just stress on the importance of studying the Welsh codes in their separate forms, as printed for the first time in 1841. Our present subject illustrates his remark. Not only the English writers (as Serjeant Runnington), but even Gans, in his great work, obtained an imperfect view of the history of inheritance law in Wales, from having access to that law only in Wotton's unchronological codification.

the only differences in the law of succession which we find on passing from Wales to England, now Saxonised. Both, doubtless, were due to ecclesiastical influence. In the absence of testament, equality of partition was still the rule, for it is impossible to credit the tradition of the *Mirror* (I. 1, 3) that a military Primogeniture was established by Alfred along with other feudal rules.* Thus we shall find the Laws of Canute (71st Law †) directing the division of the intestate's læn-land—after deduction of the lord's heriot—among the widow, children, and next of kin (as the case might be) "to every one according to the degree that belongs to him." Again, the 75th Law provides that where a man dies fighting by his lord, no heriot shall be taken, but the whole land and property shall go to the heirs "and they shall shift it according to right." (*Shifting*—the old German *Landskiftan*, modern *Landscheutan*—long remained the Kentish phrase for a gavelkind descent.)‡ We must not suppose that the female children were admitted (as is said to have been the case among the Danes) upon an equality with the males, but only on failure of them, the Saxons ever preferring the spear-side to the spindle-side. But that the Keltic rule of absolutely excluding them was not followed is evident, as well from the law admitting the widow as a successor to her husband, as from the actual precedent of Aethelfleda's suit for her patrimonial land.§

* Ed. 1642, p. 16:—"Ordeine fuit que Fee de Chivaler deviendrait al eigne fils per succession de heritage. Et que soccage fee fuist partable perenter les males enfans. Et que nul ne puissoit aliener de son heritage, forsque le quart part, sans le assent de son heire. Et que nul ne puissoit aliener son purchase de ses heires, si assignes ne fuissent especesies en les dones."

† "Ancient Laws and Institutes of England," published by the Record Commissioners, p. 177; Wilkins' "Anglo-Saxon Laws," p. 144:—"And gif hwa cwydelease of thysum life gewite, sy hit thurh his gymeleaste, sy hit thurh faerlic ne death, thonne ne tev se hlaford na mare on his aehta, butan his rihte heregeata. Ac beo be his dihte seo aehtgescyft swithe rihte wife and cildum and nehmagum, *aelcum be thaere maethe the him togebyrige.*"

‡ Lambard, Glossary, s. v., "Terra ex Scripto."

§ Hist. Rames. 24; Hist. Eliens. II. 8, printed by Gale; and see Phillips' "Geschichte des Angelsachsichen Rechts," p. 145.

Under this law it was that those holdings "in paragio," or coparceneries, arose which had not been forgotten when Domesday Book was written. Herold and Godevert and Aluric divide their father's demesne "æqualiter et pariliter;" and when, in King Edward's reign, Godevert dies, his sons inherit jointly.* Again we find an estate that belonged to "five brothers who held together, and were equal."† Again,‡ in Surrey two brothers had held jointly under Edward; each had a house of his own, "et tamen manserunt in eâdem curiâ."

In Towns, indeed, an exceptional law of inheritance had sprung up. The craftsman, unlike the farmer, could not find work for his sons at home. As soon as the lads were old enough to handle tools or to make bargains, they must be off to wherever an apprentice or a workman was needed. (Guernsey law gives sons no *préciput* if the land lie in town.) It was not until 1326 that the judges succeeded in crushing the obstinacy of the Towns, and keeping the young burghers under disability till they reached the age of fourteen. The sons who were thus early forisfamiliated, were no longer associated with the work and fortunes of the homestead, and no longer looked to it as their inheritance. Indeed, the allotment on which the little cottage had been built was usually too scanty to be worth partition. It passed undivided to the youngest son, the *suus hæres,* whom no emancipation had severed from the paternal succession.§ A similar distinction is growing up in Russia. Since the Emancipation Act of 1861 the enfranchised serfs, whilst

* Domesday Book, I. 375.

† Domesday Book, I. 168b. See also I. 7, 45, 46, 63b, 96, 111b. These references I owe to Ellis's "Introduction to Domesday Book," p. 241n. On the somewhat different meaning of Paragium in the noble fees of Normandy, see Morgan's "England under the Normans," pp. 145—147.

‡ Domesd., I. 35b, cited by Freeman.

§ Mr. Maine points out the working of the same principle in the Geilfine Group of Brehon law. "Early Inst." p. 221; and Mr. Robertson, in the Theelboors of early Friesland, "Scotland," II. 253, 266. According to Mr. Morgan (p. 154), the principle of preserving the home life was carried so far at Taunton, that there, even now (under a custom called "Borough English"), the widow is the husband's heir.

retaining their old custom of undivided family ownership, have very generally adopted the plan of making a partition among all the adult male labourers in the family, irrespective of degrees of kinship, whenever the housefather dies. The shares being equal, there is only one subject for contention. Who shall get the house? Who shall get the rooftree? It usually falls to the eldest son. But in the western and southern provinces, where greater wealth has produced a more developed civilisation—discarding, for instance, the old Russian custom of employing women in field labour—it has become common for sons to quit the home during the father's life, and establish themselves in households of their own. In districts where such a custom prevails it has been followed, as in Saxon towns, by a rule establishing the youngest son as the proper successor to the family homestead.* Again, in Silesia, where the equal partition, which the law enjoins, is usually evaded by private settlements, it is upon the youngest son that the settlement is usually made, the elder sons having left home before the parent becomes so old as to desire to surrender his position.†

Saxon law, then, showed nowhere any tendency towards Primogeniture, though it had advanced beyond British custom by establishing our present rule as to the daughters' rights, and probably by admitting in favoured *burhs* that *ultimo*-geniture which our law still retains as an exceptional urban privilege. But in the private dispositions of the great nobles the influence of the Continental aristocracy became apparent before the Conquest, a degree of preference for elder over younger sons being manifest in their Wills.‡

II.—Rise of the Law of Primogeniture in England after the Norman Conquest.

The landing of William was the beginning of the end. A new feature of national life was introduced which, silently and suddenly in the great estates, silently and

* Foreign Office Report of 1870, II. 68. †Ibid, II. 133.

‡ Pearson, I. 269.

slowly in the lesser ones, would transform the customs of inheritance. William's charter to London seems to show that already some fear was entertained, for the sole specific promise it makes is upon this subject; that "every child shall be his father's heir after his father's day."* The history of feudalism in Normandy before the invasion, and even for a century later, is lost in utter obscurity,† and it remains mere matter for conjecture to what extent Primogeniture had become established in William's Duchy before he crossed the channel. But it may well have gone far enough for a military statesman like William to have detected its importance, and determined upon its extension. The Salic law had excluded females from succession to Terra Salica, or military land, but with no hint of any preference of age amongst males. The French crown had passed to all the king's sons—including the illegitimate ones—under the first two dynasties. But, according to Montesquieu, Primogeniture had firmly established itself, by the beginning of the eleventh century, as the French rule of succession to noble titles and lands, whilst the Imperial law still regarded them as partible; and hence—rather, it would seem from feudal analogy than from the obvious reasons of public policy ‡—the crown descended by Primogeniture from the commencement of the third race of kings. An Assize of Jerusalem, framed under French influence at the end of the same century (1099), makes all noble fiefs indivisible—the king selecting the child who should succeed—even amongst daughters; § though partibility in *bourgeois* descents always prevailed there till the fall of the kingdom.‖ But we can form no trustworthy inference as to the extent to which Frank law was adopted within the Norman duchy. Down to the time when the Normans

* Stubbs' "Select Charters," p. 82. See Pearson I. 270. London was equally sedulous to obtain a confirmation of her custom of inheritance from Hen. I. See Stubbs, p. 108; and Freeman, v. 468.

† Stubbs' Const. Hist., I. 248.

‡ "Esprit des Lois," xxxi. 32; Hénault, "Histoire de France," ed. 1775, I. 117—120.

§ Haute Cour., clvi., clvii.

‖ "Le Plédéant," ch. 34, 35 (1325—1350 A.D.).

invaded Italy, a generation or two before the landing at Hastings, hereditary benefices were certainly unknown among them, though known in other parts of France as early as 877. In Brittany, Primogeniture was not introduced till 1185, even for nobles and knights.*

France, after learning from Lombardy the principle of Feudalism, had developed it more rapidly than her teacher.† The line of Capet had held the French crown for half a century, when the Emperor Conrad in 1037 published in Italy the great feudal constitutions which secured the fiefs of the inferior vassals against any alienation by their lords, and made them hereditary whenever the vassal left sons, grandsons, or brothers, yet with no preference of age in either degree. By his German constitutions, he excluded women and bastards from the succession to lands of military tenure; but not younger sons. The holders of noble fiefs soon claimed a right of inheritance like their vassals; but, like their vassals, for all their sons. It is not until 1158 that we find Frederick Barbarossa introducing indivisibility as the rule of succession for Duchies, Countships, and Marquisates. Even down to the French Revolution, an ordinary German baron had to make a family settlement, and get the consent of his younger sons, if he wished his lands to descend to the eldest one alone.‡

In England we have no written enactments of feudalism to guide us. The chief result of modern researches into our history has been the overthrow of the old belief that William imported English feudalism full grown from Normandy. We know now that Domesday contains no trace of military tenure. We know that the feudal jurisprudence of the next hundred years was developed step by step and side by side in England and in Normandy. We know that the administrative system which checked feudalism was developed in precisely the same way.§

* Robertson, "Scotland Under Early Kings," I. 285, 302, 517.

† Pfeffel, "Histoire d'Allemagne," ed. 1766, I. 149—152, and 230; Schmidt, "Histoire des Allemands," ed. 1785, III. 20 and 400. Palgrave, II. ccccxxxv.

‡ Selchow, "Elementa juris Germanici," ed. 1779, § 633.

§ Freeman, v. 396.

William concerned himself about feudalism only so far as it affected the *Barones mei*—the tenants-in-chief. What rules he laid upon them, we can never fully know; but about two there can be no doubt. Their estates were not to be aliened without his license.* Their estates were to descend to their eldest sons alone.

We shall not find, indeed, nor should we expect to find, any change taking place in the lands of the smaller owners —the lands that escaped even military tenure when it soon afterwards crept in elsewhere. Not only were most of these pacific lands still the property of Saxons, certain to stickle to the last for good King Edward's custom, but there was no motive of policy—there cannot even have been Norman precedent—to lead William to change that custom into Primogeniture; and he never changed a custom causelessly. We might rather conjecture that the partibility of these lands would recommend itself to him as a means by which Saxon estates would soon safely fritter themselves down—an euthanasia of Saxon power. But so subtle a policy hardly belongs to the eleventh century.

The compilation of laws to which William's name has been given, represents the Saxon rule of inheritance as still in vogue (Law xxxiv.): "Si quis paterfamilias casu aliquo sine testamento obierit, pueri inter se hæreditatem paternam equaliter dividant.†

But a sharp contrast to this becomes apparent when we turn to the estates of the king's great tenants-in-chief. By the help of Dugdale and of our numerous county histories,

* Freeman, v. 783, 794.

† "Ancient Laws and Institutes," p. 207. Our best authority, the Holkham MS., unhappily ends too soon for us to say with certainty whether this law gives the inheritance to the sons, or, as Hale claims, to all the children. The reading given above is that of the next best authority, the Harleian MS., and is corroborated by all the presumptions of legal history. The supposed Ingulph, on the other hand, has "les enfans;" but his version of the laws is in French, and is too corrupt to carry much weight in a disputed reading. Unfortunately Wilkins followed the Lichfield Chronicle, which similarly reads "liberi;" and historians following him have assumed as certain a version which, if genuine, would constitute a grave historical problem.

the descent of many of these may be traced from the very time of the Conquest; and the priority given to age amongst sons becomes apparent from the outset. Testaments, it must be remembered, had ceased to operate upon lands. Hence this preference of the eldest son is due to law, and not, as in Saxon times, to the father's devise. The only fact that bears even a semblance of the older system is the occasional separation of the Norman from the English inheritance; but this is explicable by the evident policy of the King-Duke.

Thus, when the Earl of Arundel died, in 1094, his eldest son, Robert, took his Norman earldom, and his second son, Hugh, took the English one; but that this did not arise from any rule of equality of partition is evident from the fact that the three younger sons went without any inheritance at all.*

So sudden and so important a change calls imperatively for explanation. Primogeniture can scarcely have obtained already such a hold in Normandy as to be the custom which a Norman colony would inevitably adopt. Nor does the aristocratic tendency which we have seen at work in the Saxon mind go far to explain the revolution. We may solve the problem if we recollect how quick William was to discern the political tendency of institutions, and how ready to change and shift them to the form most favourable to his own supremacy. He detected the disintegrating tendency of feudalism; and by the oath at Salisbury he saved the English king from the weakness of continental lords-paramount. He saw the peril of governing through the hereditary counts of France, or the vice-regal ealdormen of England; and he remodelled the administration, to bring the sheriffs into direct dependence on the Crown. He discerned the danger of continuing to identify the State and the Church; and he created the ecclesiastical courts,

* Dugdale's "Baronage," p. 27. A knightly inheritance is said in Fosbroke's "Gloucestershire," II. 471, to have been divided, a century after the Conquest, between Margaret de Bohun and her five brothers. But this is an error; Margaret only succeeded on the death of the last brother. See Rudder's "Gloucestershire," p. 612.

established the Royal supremacy, and defined the limits of Papal interference. Such a statesman would not be slow to discern the advantages he would derive from Primogeniture. The fewer the leaders by whom his army was contributed and controlled, the readier and more united would be its action. The smaller the dominant caste of nobility, the more accessible it would be to regal influence. The wealthier the Norman families, the less would be the importance of the Saxon houses. William was not a man to perceive these advantages without at once striking a blow to secure them. The danger which might ensue to monarchy from the concentration of aristocratic power in fewer hands, he guarded against by geographical divisions. The estates given to one great vassal were scattered over twenty counties; those of another over twenty-one.

Lord Chief Baron Gilbert reminds us* that a further incentive to military Primogeniture was found in the mediæval physiology, which taught that to the eldest son the best blood and spirits of the father were transmitted, apparently on the principle by which Dryden accounts for Monmouth's superiority to Charles's other sons. Modern statistics point in a different direction. The perils of primiparity are so great, that amongst firstborn children the proportion of idiots is half as large again as amongst their younger brothers and sisters. There are physical as well as moral dangers to warrant the Scornful Lady's congratulation.

> "I joy to hear you are wise. *'Tis a rare jewel*
> *In an elder brother.* Pray be wiser yet."†

Too few of William's charters of gift to secular vassals have been preserved for us to judge whether the continental precedents were ever followed, and the new line of inheritance specified in the grant. The few that we possess show no change in matter or form from those of the Saxon kings.

* "Tenures," note xiv., Walkins' edition. Contrast Duncan "On Fecundity," pp. 289—291.

† Beaumont and Fletcher, "Scornful Lady," Act iv. Sc. 1.

As charters were not yet in use in Normandy, there was little likelihood of the feudal forms being introduced. It is enough for us to know that all the changes of ownership were followed by a change of descent, and that both alterations were effected without any legislative act. Equally silently were the other peculiarities of English military tenure created by Flambard in the following reign.

How soon the tenants-in-chief began to pursue a similar policy with their own knights we can only conjecture. They may have adopted the plan with readiness, the more so as it set a new distinction between their lands and those of the conquered race. But more probably its military advantages would be less apparent to them than to their far-seeing leader; and some years, or even reigns, may have elapsed before Primogeniture became—as within a century of the Conquest it did become—the universal accompaniment of even the humblest military tenancy. The establishment, under Rufus, of the claim to wardship and marriage, would, indeed, dispose lords rather to favour the custom of partibility, which multiplied the chances of an infant's succession,

In this, as in all other points, the new system of land tenure came in only by degrees. There was no one moment at which a feudal system was imposed upon the country. The seed which William sowed and Ranulf Flambard watered, did not reach maturity until the time of Henry of Anjou. From his institutions and from Glanville's code, not from William's conquest, must the new era of English law be dated.

The age of petty wars and feudal exactions which followed upon William's death, produced in the lands of humbler men a change in the direction of Primogeniture. England seemed a camp, and every man was his own constable. Having little hope of protection from the central power of the realm, men secured themselves by consolidating the local power to which they could look for shelter. The younger brothers of the yeoman, as well as the younger brothers of the knight, preferred the shelter of a patriarchate to the perils of independence. The experience of

Wales is repeated in England, though it is against harsher violence and by sterner weapons that the subjects of Rufus and of Stephen claim their *dadenhudd*.

Thus within a short time of the Conqueror's death, Primogeniture began to extend itself into the lands of socmen. Sir Matthew Hale discovers one step of the transition, a stage when "the whole land did not descend to the eldest son, but begun to look a little that way," in a clause in the text-book which calls itself the "Laws of Henry I." This clause seems to have been much misunderstood. A law copied from the Ripuarian code provides for the succession of parents and collaterals if lineal heirs were wanting, with priority for males over females, but apparently no priority for age.* Then follows this law :—

"*Primo patris feudum primogenitus filius habeat;* emptiones vero vel deinceps acquisitiones suas det cui magis velit. Si bocland habeat quam ei parentes dederint, non mittat eum extra cognationem suam."

Taking the whole passage together, the meaning of the italicised clause is clear. It relates, not to descent like the preceding law, but to the restraints on alienation. Inherited land cannot be sold or devised beyond the family. Land newly acquired may, but with one exception; if it had been received on the terms of feudal service, a strange tenant cannot be forced upon the lord. This is simply equivalent to lxxxviii. 14:—"Nemo forisfaciat feudum suum legitimis heredibus suis, nisi propter feloniam vel redditionem spontaneam." Sir Matthew Hale, however, whom Reeves and Blackstone seem to have copied without further inquiry, punctuates the passage so as to make this clause the conclusion of the preceding paragraph; and instead of "primo," which would there be incongruous, makes sense by reading "primum."† He also omits to notice that (as Mr. Finlason points out) the whole chapter in which these paragraphs occur does not purport to record the common law

* "Ancient Laws and Institutes," p. 249 ; Wilkins, p. 266.

† *Primo* is the reading both of Wilkins and of the *Ancient Laws*, and of all their MSS. Yet Hale's misquotation has obtained universal currency.

but only the provincial "Consuetudo Westsexe."* The only connection of the clause with the history of descent would seem, then, to be that it shows that near the beginning of Hen. II.'s reign† a writer attached to the older elements of the law nevertheless recognised that Primogeniture (true and exclusive) prevailed wherever a strict feudal relation had been established. This is no more than we learn from Glanville immediately afterwards. Hale and Reeves must have felt the difficulty of seeing how Primogeniture could have been developed piecemeal, by the stepping stone of a *Præcipuum;* for Reeves‡ refers the supposed "Primum feodum" clause to knight-service lands, whilst Hale seems to treat it as a part of the law of socage. The history of law gives as little ground as does *a priori* reasoning, for supposing that a limited privilege of this kind would develope in time into exclusive Primogeniture. In every mature system of Partitive Descent we find some such provision for securing the continuity of the father's household, assuring fixity of tenure to that son, eldest or youngest, whom the circumstances of the country identify most closely with the family life. In Russia customs differ, as we have seen, in the selection of the son who shall take the roof-tree; but under both the customs, the widow still remains in its shelter. The supposed "primum feodum" would only be the counterpart of the youngest brother's *tyddyn* in Wales, his *covert del astre* in Kent, the "capitale messuagium" of Glanville's eldest Socman, the "chefmois" of the Norman roturier, and the præcipuum which Scottish law in our own day concedes to the first of the heirs portioners.

We have no authentic materials for the history of English law between Domesday Book and the great treatise of Glanville. The latter is our first picture of feudal law; a

* The influence of Wessex was less under Hen. I. than under the two Williams.—Freeman, v. 160—162.

† The whole question as to the date of the "Laws of Henry I." is discussed by Mr. Freeman ("Norman Conquest," V. 872). He considers them not earlier than 1151. Mr. E. W. Robertson refers them to John's reign.

‡ I. 76.

picture of a wider field than its own words claim, for the great Justiciar's rules reappear in the *Regiam Majestatem* beyond the Tweed, and in the *Grand Coutumier* across the Channel. Glanville (1187-1189) writes after the lapse of just a century from Domesday. Primogeniture is fully established in knightly lands, and is making its way amongst socagers. That its institution was due to military considerations is made clear by the fact that in military lands alone is it systematically established; and that in them it only holds good when the heir is of the military sex, or (if we may suppose Bracton's rule to have been already adopted) the inheritance is of value for strategic purposes. From various motives, of personal safety, family pride, or aristocratic example, it was spreading amongst socage tenants, but to what extent it had yet gone Glanville's language scarcely enables us to conjecture. "When the owner of a descendible estate dies," he writes, "if he had an only son to be his heir, it is universally true that this son succeeds to all the father's property. If he left more sons than one, there arises the question whether he was a knight or military tenant, or a free socman. For if he were a knight or a tenant by knight-service, then by the law of the realm of England the firstborn son succeeds to the whole of his father's property, so that none of his brothers can by law claim any part of it. But if he were a free socman, the inheritance in that case will be divided amongst all the sons according to their number in equal shares, *if this socage tenement were partible by ancient custom;* the chief messuage being, however, reserved for the firstborn son in honour of his seniority, but on the terms of his making compensation to the rest of his brothers from the rest of the property. But if it were not anciently partible, then by the custom of some places the firstborn son will take the whole inheritance, but by the custom of others the youngest son is heir."* From the

* Cum quis hæreditatem habens moriatur, si unicum filium hæredem habuerit, indistinctè verum est quod filius ille patri suo succedit in toto. Si plures reliquerit filios tunc distinguitur utrum ille fuerit miles seu per feodum militare tenens, an liber sockmannus. Quia si miles fuerit vel per militiam tenens, tunc secundum jus regni Angliæ primogenitus filius patri succedit in

priority of mention conceded to partibility, and, indeed, from the whole tone of the passage, we must infer that in the majority of socage tenements the traditionary Saxon rule was still preserved, and that Primogeniture was merely a local peculiarity like Borough-English. This inference is confirmed by Glanville's more transient references to socage descents. He speaks of "A plurality of heirs, of females, for instance, in a military fee, of either males or females in free socage."—(xiii. 11.) Again—

"You must notice that if a man who possesses free socage land has left several sons, who are all to be equally admitted to the inheritance in equal shares, then it is universally true that their father cannot out of his inherited estate, nor, if he have no inherited estate, even out of a purchased one, make an advance to any of the sons beyond his proportionate presumptive share of the whole of the father's property."* Matters may perhaps have gone so far that all legal presumption in favour of partibility had ceased, and that now every plaintiff who claimed as a socage heir had to show what form of descent was customary in the lands in question. But it is

totum, ita quod nullus fratrum suorum partem inde de jure petere potest. Si vero fuerit liber sockmannus tunc quidem dividetur hæreditas inter omnes filios, quot quot sunt per partes æquales, si fuerit socagium illud *antiquitus divisum;* salvo tamen capitali messuagio primogenito filio pro dignitate æsneciæ suæ, ita tamen quod in aliis rebus satisfaciat aliis ad valentiam. Si vero non fuerit antiquitus divisum, tunc primogenitus secundum quorundam consuetudinem totam hæreditatem obtinebit; secundum autem quorundam consuetudinem postnatus filius hæres est. Item si filiam tantum unam reliquerit quis heredem, tunc id obtinet indistinctè quod de filio dictum est. Sin autem plures filias, tunc quidem indistinctè inter ipsas dividetur hereditas, sive fuerit miles sive sokemannus pater earum, salvo tamen primogenitæ filiæ capitali messuagio sub formâ præscriptâ.—Glanv. VII. 3.

* Plurium heredum conjunctio, muliorum scilicet in feodo militari, vel masculorum vel fœminarum in libero socagio.—Glanv. xiii. 11. Sciendum autem, quod si quis liberum habens socagium plures reliquerit filios, qui omnes ad hæreditatem æqualiter pro æqualitus proportionibus sunt admittendi, tunc indistinctè verum est quod pater eorum nihil de hæreditate, vel de quæstu si nullam habuerit hæreditatem, alicui filiorum, quod excedat rationallem partem suam quæ ei contingit de totâ hæreditate paternâ, donare poterit. Sed tantum donare poterit de hæreditate suâ pater cuilibet filiorum suorum de libero socagio in vitâ suâ, quantum jure successionis post mortem patris idem consecutus esset de eadem hæreditate.—Glanv. vii. 1.

improbable that the change had yet got so far as to destroy the natural presumption in favour of the ancient custom.*

The warlike times of Richard I. have left us little legal literature, and no direct evidence of the changes that were going on in the custom of descents. But the crusade called the great nobles abroad, and left humbler men a quiet time of progress. The judicial institutions of Henry II. were maintained and developed, and their influence, as we shall shortly find, was hostile to the ancient custom. Hence, by the outset of the following reign, Primogeniture had become the prevalent custom of descent in socage lands. Under John there is no longer even an equality of presumption between the three customs; the brother who opposes the right of Primogeniture now finds the burden of proof cast upon his shoulders.

Before John had been two years on the throne, this change in the law was fully established. In Michaelmas Term of the second year of his reign (1200) a writ of right† was brought to decide the succession to some socage lands at Gunthorpe in Rutlandshire. The plaintiff, as we should expect, was a younger brother; for the elder brother, having a title under either custom, would seldom fail to take possession. Gilebert de Beivill, then, sues William de Beivill for two virgatæ out of their father's inheritance. The defendant

* The Scottish *Regiam Majestatem*, II. 27, copies the first passage cited above from Glanville. Skene (A.D. 1597) thus translates it:—"Gif ony man deceasis, and leavis behind him maa sons nor ane, either he is succomannus, and haldis not his lands be service of ward, and then his heretage is divided amangst all his sonns; or he is miles, in the quhilk case, the eldest sonne succeedis in the hail lands quhilk heretably perteined to his father." But he adds—"This distinction is not observed be the practicque of this realm. Be the quhilk the eldest son succeedis to his father *ex asse*—that is, to all and haill his father's heretage and landes." If Scotch feudalism ever did recognise these customs of partibility—and it is a matter of controversy whether *Regiam Majestatem* as a whole represents the actual Scottish law of its time—the final victory of Primogeniture was more rapid and more complete than south of the Tweed. Scotland has no Kent.

† Rot. 7, *in dorso*. Printed in the "Abbreviatio Placitorum," p. 28, col. 2. Hale (Hist. C. L., p. 187) cites this case, but mistakes the party for whom judgment was given; perhaps from "Gs." being the abbreviation of each brother's name.

pleads "That that socage was never parted nor partible;" and in the absence of evidence to oppose this plea, judgment is given for the defendant. "Quia Gilebertus nullam probam perduxit, consideratum est quod Gulielmus eat sine die et quietus." In later practice such a plaintiff would have been required to aver, as well as to prove, the partibility.

The establishment of this new presumption throughout the rest of England would bring into vivid contrast the permanence of the older custom in Kent. It is at this period, when for the first time the partibility of Kentish lands has sunk into a local peculiarity, that their peculiar name makes its way into our jurisprudence. The records of proceedings before the justices in Eyre in Kent in the fourth and in the ninth years of John's reign* contain pleas by the defendant in assize which describe his land as "gavelykinde."

It need hardly be said that this change of presumption would have a powerful effect in destroying the partibility of lands. When two, three, or four successive owners of the same tenement had only left daughters or single sons as their heirs, it would be difficult to produce evidence of some earlier parted male descent to rebut the new presumption. Three descents is the point to which we shall find title traced in such cases in Edward I.'s Year Book. Yet in those days, when the proportion of children who reached to adult life was, from bad hygiene, much smaller than at present, we may fairly calculate that one estate in every eight would pass through at least three descents, without any owner being survived by a plurality of sons. In other words, the two generations that had elapsed before Bracton wrote had given time for the "rule in Beivill's case" to have disgavelled at least one-fourth of the partible land in the country.

Throughout that period the custom of Primogeniture was steadily on the increase, favoured by circumstances the very opposite of those which had favoured it a century before. From Domesday to Glanville it had been resorted to by the

* Pasch. 4 Joh. rot. 6, *in dorso*. Kanc.; Pasch. 9 Joh. rot. 7. Kanc.; quoted by Robinson in his "Gavelkind."

socagers in consequence of the decay of legal organisation. From Glanville to Bracton it is forced upon the socagers in consequence of the revival of legal organisation. The establishment by Henry II. of a strong central tribunal caused a rapid development of jurisprudence, whilst the frequent visits of the itinerant justices carried the new principles into every part of the country.* The fascinating ideal of Roman law had just seized upon the minds of Englishmen. The effort to simplify and systematise custom was at its height. The metropolitan judge construed local custom strictly, and, moreover, never carried it into other neighbourhoods. Hence the uniformity of descent in freehold lands contrasts vividly with the eccentric customs of copyhold inheritances, which did not fall under the jurisdiction of a central court until two centuries after this. Still stronger is the contrast with the endless complications of the French provincial laws, over whose peculiarities no metropolitan tribunal ever exercised supervision.

By a further paradox, the military change which set in simultaneously with this judicial one was also, and as unexpectedly, favourable to Primogeniture. The institution of Scutage undermined the military system, for the sake of which alone Primogeniture had been introduced. But by so doing it removed from view the motive for establishing a double system of descent, and by rendering this system to all appearance an objectless complication, gave free scope to the reforming spirit of the time.

Two illustrations of the ease with which estates passed from the old custom to the new are to be found in those early year-books which the Master of the Rolls has lately reprinted from the Cambridge MS. In 1292 two younger brothers sue† the eldest for their purparties of the inheritance, and the history of the estate is carried back for three successions. Their great-grandfather had six brothers. Two of them had divided the inheritance with him; but as this left four unprovided for, it is not unlikely that the two entered only as

* Stubbs' Const. Hist., I. 387—390, 596—604; Stubbs' Select Charters, 131; Digby, 54—57.

† De Mautely *v.* De Mautely, 20 Edw. I. p. 230.

purchasers from their brother and not as co-heirs with him. Still this succession must have been regarded as questionable, for when the eldest brother died, all the six younger "agreed and granted for themselves and their heirs that the land was not partible; and thereupon they levied a fine." This solemn declaration settled the question for the time, and their eldest brother's eldest son succeeded him, to the exclusion of five younger sons. Again, in a similar action ten years later,* the estate appears to have been parted in Richard's reign, and again in John's; but the father of the present litigants had succeeded by exclusive Primogeniture. This case is also valuable as showing that the analogy of the Statute of Westminster the First had already been adopted, and the accession of Richard taken as the limit of legal memory; that date is here stated as the point beyond which evidence of ancient partition need not be carried.

But the great turning point in jurisprudence was reached on the day when the presumption of custom was reversed. After this, the mere extension of geographical area involved no modification in the rules of law. Bracton, seventy or eighty years after Glanville, states the law of socage descent in terms which vary less than might be expected from the rules of Glanville. One change alone is prominent. If the free socman's land is not partible, no one but the eldest son can be heir of it. It is only in *villein* socage that Primogeniture remains a mere "quorundam consuetudo," contesting the field with Borough English.† A little earlier he had laid down,‡ in the words which Fleta copies, as the general principle of inheritance law, that "If a man have more sons

* Selman *v.* Sedman, 30 Edw. I., p. 56.

† "Si liber socmannus moriatur pluribus relictis heredibus et participibus, si hæreditas partibilis sit et ab antiquo divisa, hæredes quotquot erunt habeant partes suas æquales; et si unicum fuerit mesuagium, illud integre remaneat primogenito, ita tamen quod alii habeant ad valentiam de communi. Si autem non fuerit hereditas divisa ab antiquo, tunc tota remaneat primogenito. Si autem fuerit socagium villanum tunc consuetudo loci erit observanda. Est enim consuetudo in quibusdam partibus, quod postnatus præfertur primogenito, et e contrario."—Bracton, fol. 76.

‡ Si quis plures haberet filios, jus proprietatis semper descendit ad primogenitum, eo quod ipse inventus est primo in rerum natura.—Bracton, 64b.

than one, the right of ownership always descends to the first-born, since he was the first to come into existence." He once speaks, as does Fleta in the corresponding passage, of the partition of a tenement held by military service, in terms which imply that even there a partition might arise among *male* coparceners. How this is to be reconciled with Glanville's absolute statement about knightly Primogeniture it is vain to inquire at the present day. Exceptional local custom may in some rare instances have kept a military fee partible; or the writers may have had in their minds only a partition between sisters' sons; but the corruptness of the present printed texts of both Bracton and Fleta renders it more probable that in "primogenitus" and "primogenito" we have copyists' errors for "primogenita" and "primogenitæ," and that the partition in view was not among coheirs but coheiresses.

Bracton* lays down a further rule, copied by Fleta and by Britton,† which vividly illustrates the military advantage of Primogeniture. Where a partition takes place, the manorhouse or castle which is the chief building of a county or a barony, must not be parted. It must be given into the sole charge of the eldest son or daughter, "for the right of the sword, which suffers no division." But that the reason of this rule lay in the military policy of having a single leader at the head of a beseiged force, and not in any belief in a birthright of the eldest child, is clear; as well from the fact that the child who so received the castle had to pay a compensation for the others' share of it, as from the further rule that where there were more such chief buildings than one, they should not all go to the eldest, but be given to the children in succession so far as their number allowed. Primogeniture similarly obtains amongst daughters when an hereditary office, like that of Constable of England, descends to them; the husband of the eldest alone can execute its duties. This principle of the indivisibility of a public function is most prominently illustrated by the descent of the royal crown to the eldest of the King's daughters. In the

* Fol. 76. † III. S. 1.

case, however, of mere titles of honour the principle of indivisibility is applied without adhering to the principle of Primogeniture. Bracton recognises, unlike Continental Feudists, the right of female descendants to a title of dignity, and gives it to the eldest daughter. But Henry III. seems to have rejected in practice* the claim of female heirs; and when later law recognised their right, it recognised also the right of the Crown to choose any one of the daughters to be the peeress. (But the *lands* will of course descend to them all, as coparceners.) This power of selection represents a stage through which the inheritance law of land has also passed; for after the Continental Feudists had recognised the hereditary nature of the vassal's tenancy, they continued for some time to give the lord the right of selecting the son who should succeed. Similarly the Canon Law, after establishing the absolute duty of paying tithe, originally permitted the payer to select the priest to whom his contribution should be given.†

In one point Bracton's law of descent shows a marked advance upon Glanville. In Henry II.'s time it was still "magna juris dubitatio"‡ whether at a military tenant's death his fief must go to his eldest living son; or whether a grandchild by a predeceased elder son would have a prior right. When Primogeniture comes to be regarded as the fundamental principle of the law of descent, the right of representation seems a necessary logical consequence. But in earlier days, when men still regarded Primogeniture as a mere means to an end, they could not fail to see that it was the eldest descendant, not the descendant of the eldest line, that would best serve the military purpose of the rule. The principle of Representation established itself in France whilst the controversy was still waging in England. Hence whilst across the Channel Arthur was generally regarded as Henry's lawful heir, and John as an usurper; John, though already personally unpopular, found his claim recognised in Normandy and England. But in spite of this great precedent,

* Selden, "Titles of Honour," p. 881; and p. 644.

† On the whole of this subject see Co. Litt. 165a, with Butler's notes.

‡ Glanville, vii. 3. Bracton, 64b.

English legal opinion ultimately adopted the Continental rule, doubtless because the institution of scutage and the settled state of the country had now destroyed the original motives for Primogeniture. Hence Bracton gives it as settled law that the descendant always represents the ancestor in his rights of inheritance.

Mr. Barrington* has published some old French verses which assert that in 1263 (about the time when Bracton was writing) the law of Primogeniture, then "de tres long tenue" in England, became the subject of a debate in Parliament. It is contrasted unfavourably with the custom of France, which prescribed

> "Que les enfans d'un père nez,
> S'engendrez fussent loyauement,
> Partissent a leur ygaument
> Et selon l'ordre qu'ils devoient,
> Comme cil de France faisoient."

Fleta, twenty years later, gives a mere repetition of Bracton, and the language of an advocate of Fleta's time puts socage Primogeniture on but a qualified basis. In De Mautely *v.* De Mautely,† the eldest son's counsel only urges that "The tenements are socage, it does not thereby follow they are partible; for *in some places* as well the tenements holden in socage as other tenements are governed by the common law." But Britton, though very little later than Fleta, expressly recognises Primogeniture as the general law of land, saying without qualification, "Age is material, because he who is the firstborn is admissible before the younger son of the same father and mother."‡

Indeed, the Statutum Walliæ, enacted in A.D. 1284, a year or two before the publication of Fleta, makes it clear that by that time, Primogeniture was familiarly recognised as the common custom of English inheritances. It treats the partibility of land among males as a Welsh peculiarity, sharply opposed to English usage.§ This partibility it per-

* "Observations on the Statutes," note on the Statutum Walliæ.

† See above.

‡ Britton, vi. 2, 3 (Mr. Nichol's translation).

§ 12 Edw. I :—"Quia aliter usitatum est in Wallia, quam in Anglia quoad successionem hereditatis, eo quod hereditas partibilis est inter heredes mas-

mitted the Welsh to retain; a concession which they doubtless regarded as a proud national distinction, whilst Edward saw in it a lasting security for their military impotence. He let confusion rest upon their banners. But where only civil policy was concerned, he fearlessly introduced the English rules of succession, excluding bastards, admitting daughters in default of sons, and giving widows a right to dower. The gavelkind of Wales was henceforth identical with that of Kent.

We have already said that the old Welsh gavelkind was of Keltic origin, and is merely Irish gavelkind modified in one point, though by far the most important point of all. We may pass with a smile the patriotic theory of Somner* that Wales and Ireland borrowed the custom in admiration of the men of Kent. The independence of the two currents of custom—apart from the common Aryan element—is sufficiently marked by the three peculiarities which distinguish the Teutonic from the Keltic form,† and by the difference of name. "Welsh Gavelkind" and "Irish Gavelkind" are the barbarisms of English jurists—phrases unintelligible in the countries which they concerned. The utter inapplicability of such a name to the Rhein-ta-loon of

culos, et a tempore cujus non extitit memoria partibilis extitit; Dominus Rex non vult quod consuetudo illa abrogetur, sed quod hereditates remaneant partibiles inter consimiles heredes, sicut esse consueverunt, et fiat partitio hereditatis illius sicut fieri consuevit; hoc excepto, quod bastardi non habeant de cetero hereditates et etiam quod non habeant de cetero propartes cum legitimis nec sine legitimis. Et si forte hereditas aliqua extunc pro defectu heredis masculi descendat ad legitimas mulieres heredes ultimi antecessoris sui inde seisiti, volumus de gratia nostra speciali quod eodem modo mulieres legitimæ habeant propartes suas inde sibi in curia nostra assignandas, licet hoc sit contra consuetudinem Wallensicam antea usitatam." And again :—"Quia mulieres hactenus non extiterant dotatæ, rex concedit quod dotentur."

* "On Gavelkind," p. 54.

† This is evident from the following summary :—

Gavelkind Land.	Irish.	Welsh.	Kentish.
Partible among	Clansmen	Sons	Sons.
Bastards	Included	Included	Excluded.
Daughters	Excluded	Excluded	Postponed.
Dower	Refused	Refused	Allowed.

Ireland, sets a stumbling-block before the English reader at the very outset of Irish history.

But Gavelkind has long been a favourite field for theorists. Indeed, the anomaly of its survival in Kent is a problem that arrests the attention of every student. It has been said that the Welsh retained Partibility in order that noble blood might never be landless, since "every son is as good a gentleman as his elder brother." It has been said that the Kentishmen retained it because they were not gentlemen, but plain farmers, indifferent to family dignity. It has been said that Bishop Odo and his Normans forced it upon the men of Kent. It has been said that it was preserved in the teeth of the Normans by the daring of the men of Kent at Swanscombe. It has been said that Wales and Kent retained it for military reasons, one being exposed to Ireland and the other to France, "that every man might have means to resist the enemy." Whilst it has been observed as plain matter of fact, that in Kent, as in the rest of England, partibility never extended to military land.

But the history of Primogeniture remains gravely defective, so long as the unique position of Kent remains unaccounted for. It is an anomaly of the highest value for the historian; for it enables him to test his general theory by a strict application of the Method of Difference. The popular explanation,* which refers this peculiarity, the Kentish survival of Saxon custom, to the special favour of the Conqueror, itself requires explanation. It is quite possible that beneath the fable of the moving wood of Swanscombe some true story is concealed. It is quite possible that William did covenant with the men of Kent for the preservation of their Saxon laws. It was a covenant which he made with other Englishmen. It was a covenant which he confirmed by charter and by statute. But the difficulty comes back in another form. Why was the covenant kept in Kent, when it was forgotten everywhere else?†

* Stephen's Blackstone, I. 222.

† Palgrave (Hist. Norm. III. 364) accepts the "substantive truth" of the story. But Mr. Freeman (Norman Conquest, III. 538n) observes, "There is nothing to show that Kent was better treated than the rest of England. As

The fact is that William dealt with the land of Kent as he dealt with the land of every county. What he gave to military tenants, he gave to descend by Primogeniture—and every manor mentioned in the Domesday survey of Kent was held by military service, except those that lay in frankalmoign. What he left in the hands of the old owners, he left to descend by the old custom. It was only in later days than William's that any distinction arose between Kent and the rest of England. In the country at large, as we have seen, Primogeniture was introduced into military lands from above, and avowedly, by the ambition of the superior as he granted each new tenement; but into socage lands, from below, and silently, by the timidity of the socagers as they sought each other's protection. In Kent it was the socage lands alone that escaped Primogeniture. Was there anything peculiar in the position of the Kentish socagers?

There was. They had less danger to fear, and far more strength to resist danger, than their brothers in any other part of England. Even at the date of Domesday, the cultivators of Kent held a far different position from that of their brethren in other counties. In name alone had the "ceorl who sat upon Gafol-land" sunk into a villein. He is still *alodiarius*, and so can sell his land without licence from the lord; though he may be outlawed if he quit it. He has not lost his place in the freemen's hundred-moot. The *villani* of Kent were free socage tenants, and the *bordarii* free husbandmen; only the *cotarii* and *servi* were in the same position of serfdom as the *villani* of other counties.* In other words, three-fifths of the population of England were in a state of degradation, in which only one-eleventh of the Kentish folk lay. By Edward I.'s time it had become a proverb that "there

it was put under Odo, it was, perhaps, treated a little worse." And again (v. 810), "Nothing better upsets the legendary belief that Kent obtained special privileges from William than a glance at the Kentish Domesday. . . . . At the time of the survey there was not a single private English tenant in capite in all Kent."

* Elton, "Tenures of Kent," pp. 121, 134, 147, 148.; E. W. Robertson, "Scotland under her Early Kings," II. 166, 264-6.

are no villeins in Kent;" and the son of a villein, if born there, became free.* By far the larger portion of the soil was cultivated by freeholders; everywhere else the great body of the cultivators were the mere playthings of the lord's will. Hence the paucity of copyholds in Kent at this day. In Domesday Book these freeholders, the 6597 *villani* and 3118 *bordarii*, hold land to the extent of 2332 sulings, or ploughlands.† All the rest of the inclosed land of the county, all the demesnes of the military and the spiritual lords, amount only to 680 sulings.‡

But the free cultivators had another advantage. The lords of Kent were less terrible than those of other counties. In the Domesday of 1086, as in that of 1876, Kent stands out as the shire of pious uses. Besides the Church's vast possessions in frankalmoign, she was the great military tenant of the county. Of the 278 knights' fees holden *in capite*, 108 were hers.§ Whatever were the vices of a spiritual rule, it was not one from which the tenant need fear violence or bloodshed; it was not a rule of wanton wrong.

Finally, the geographical position of Kent was a safeguard to the socager. The oppression in which a feudal lord could safely indulge in a remote shire became too perilous within a short march of the metropolis, and on the highway of armies to the Cinque Ports. It is a significant fact that nowhere in England is the hold of Primogeniture so limited as in the counties which lie between London and the Channel seaboard. Gavelkind is supreme in Kent; Surrey and Sussex are the strongholds of Borough English.‖

* So held in 30 Edw. I.; and see Y. B. 7 H. 6, 33a.

† Elton, pp. 121, 134, 147, 148.—Mr. Elton points out the errors into which Lingard (I. 372) has fallen on this subject.

‡ It was even said judicially, in 18 Edw. II., that "all the land in Kent is holden in socage;" but this (even allowing for the creation of petty serjeanties and the diminution of frankalmoign, in the intervening centuries) was, of course, an exaggeration.

§ Hasted, in the eighteenth century, computed that the episcopal and other corporations held lands in Kent (independently of glebes and tithes) to the value of £56,000 a year (Hist. Kent, I. 301).

‖ No less than 143 manors in Sussex are said to preserve this custom, thus making it "almost the common law of that county." Mr. Corner, who reckons 136 such manors in Sussex, only found 183 in all the rest of England.

These three causes combined to preserve in Kent the Saxon law of inheritance. The unusual predominance of socagers among the freeholders who declared folkright in the shiremote, sufficed to preserve also other Saxon customs which stood in less peril. The lord could claim no fine on alienation. The lord could not eject the sons of the convicted felon. In Bracton's time* socage tenants all over England were regarded as minors until fifteen. The influence of the Proculian rule reduced this, before Littleton's day, to fourteen. But in Kent the socage majority among the suitors of the shiremote was strong enough to outvote the change. On this point, at any rate, the difference of law could not be due to any conduct of William the Conqueror.

Where the influence of the socagers and their shiremote did not extend, gavelkind became as obsolete in Kent as elsewhere. The military tenants adopted Primogeniture. Nay, when the socagers themselves accepted demesne land in villein tenure, they had at first to submit to Primogeniture. The men who held of the Priors of Canterbury in villein socage, who could sell neither their lands nor their bullocks without licence from the monastery, inherited those lands by the knightly rule; "antenatus succedet in totum." By the end of Richard II.'s reign, however, gavelkind had spread itself over every kind of ancient socage land throughout the shire.

The security which the socagers in Kent derived from their numbers, was possessed also throughout England by the burgesses of towns. Here, again, there was no military service which could lead the lord to desire Primogeniture, for the *firma burgi* bought off all exactions. A Borough English, or in plainer phrase, a Saxon town, thus left unaffected by either of the currents of circumstance that were spreading Primogeniture in the rural districts, would preserve its ancient custom unimpaired. Hence arose vivid contrasts like that which was visible in Edward III.'s time at Nottingham,† and which was still perceptible there in the

* Fo. 66.

† Y. B. 1 Edw. III. 12a. Compare the Domesday (179) account of Hereford —a place where Borough English is still strong.

eighteenth century. In the old *burgh Engloyes* the land went on descending to the youngest son, whilst beyond its West end a new settlement had sprung up since the Norman Conquest, and in that *burgh Frauncoyes* Primogeniture prevailed. It must be remembered that the old Saxon right of devise was also preserved in towns, so that a home-keeping elder son would not be left destitute.

Yet from time to time Primogeniture made headway even in Kent. Record remains of at least two busy periods of disgavelment—the thirteenth and the sixteenth centuries. The earlier one is due to regal prerogative; the latter to statute. The extension of Primogeniture to socage lands was avowed as an object of statecraft, and political authority was exercised directly on its behalf. The king would turn into knight service the gavelkind lands of his tenant-in-chief, or would ratify a corresponding conversion made by a mesne lord. Nay, John gave to the Archbishops of Canterbury, by an anticipatory charter, full power to make such conversions whenever they should will. By the law of that time,* all such changes of the tenure destroyed the custom of partibility. The gavelkind lands which John de Cobeham held of mesne lords in Kent were brought under the law of Primogeniture by Edward I. The charter purports to make this change solely by way of special favour and honour, in return for Cobeham's services to the crown. But it is a significant fact that its only recital is not a statement of those services, but an impeachment of gavelkind on grounds of public policy. The passage stands in vivid contrast with the Statutum Walliæ. Edward's power lay in the strength of Kentishmen and the weakness of Welshmen. From Kentish gavelkind, says the king, "it hath frequently come to pass that lands and tenements, which whilst in single hands and unparted were large enough to give strength to the realm and decent support to many dependents, have presently been torn and split amongst joint heirs into so many parts and parcels, that at last no man's share was large enough for his own support."†

* Not in later times. Y. B. 26 H. VIII. 4b. John's charter is of 1202.

† The charter is given in Robinson's work on Gavelkind, p. 77 :—"Ad

But the next generation saw this prerogative abandoned. Early in Edward II.'s reign* a plaintiff in the Common Pleas boldly asserted in his replication the invalidity of a charter by which Henry III. had ratified a similar conversion of gavelkind lands, made by a seignoress who held under a treble subinfeudation. Before the question could be argued, Edward addressed to the judges a royal writ in assertion of the prerogative, citing Cobeham's charter as a clear precedent, and declaring such conversions to have an evident object and to be for the necessary interest of the realm. But legal opinion must have become strong against the prerogative, for the justices remained unconvinced; they avoided the royal displeasure by giving no judgment for either side. The prerogative was never exercised again, even on behalf of tenants-in-chief.

A century and a-half elapsed before Parliament began the work of disgavelment. There were in 1439, according to the preamble of 18 H. VI., c. 2,† not more than forty men in Kent holding lands that were *not* gavelkind. In 1496 Sir Richard Guldeford's lands, and in 1524 Sir Henry Wiat's were disgavelled by private Acts. But immediately after the dissolution of the monasteries a more sweeping measure was passed. The favourites whom the king endowed out of his Kentish spoils would not let the families they were founding be dissolved by Kentish partitions.‡ The Act which was passed for their protection

regiæ celsitudinis potestatem pertinet et officium, ut partium suarum leges et consuetudines quas justas et utiles censet, ratas habeat, et observari faciat inconcussas; illas autem quæ regni robur quandoque diminuere potius quam augere aut conservare videntur, abolere convenit, aut saltem in melius apud fideles suos et bene meritos de speciali gratiâ commutare; cumque ex diutina consuetudine quæ in comitatu Kanciæ quoad divisionem et partitionem terrarum et tenementorum quæ in gavelikendam tenere solent, frequenter acciderit, ut terræ et tenementa quæ in quorundam manibus integra ad magnum regni subsidium et ad victum multorum decenter sufficere solent, in tot partes et particulas inter cohæredes postmodum distracta sunt et divisa, ut eorum nulli pars sua saltem sufficere possit ad victum."

* Gatewyk *v.* Gatewyk (6 Edw. II. 80, according to Robinson).

† Mr. Elton gives, however, some reasons for supposing that this estimate was not quite exhaustive.

‡ It must be remembered that the Statute of Wills was not yet passed, and that the Kentish custom of devise was not established as valid till Chas. II.'s reign. Intestate succession was still universal, except as regarded uses.

was important enough to be placed among the public statutes (31 Hen. VIII., c. 3); it disgavels the lands of thirty-four proprietors. Early in Edward VI.'s reign a further disgavelling Act was passed, covering the lands of forty-four proprietors; and three Acts of slight importance followed, the latest being in 1624. All these statutes aimed solely at the introduction of Primogeniture, and leave the other gavelkind customs still in force.*

The work of disgavelment was hardly over when, by the indirect operation of the local law of Evidence, an opposite process began. In Kent the ancient presumption in favour of the partibility of socage land had never been abandoned. Hence, no eldest son can establish his exclusive right except by giving express evidence of previous exclusive descents, or by showing a statutory disgavelment. But as the Acts only name the proprietors without describing their estates, the identity of the disgavelled land can seldom be established after the lapse of three hundred years. Nor is much help usually obtainable from evidence of previous descents, since intestacy has long been rare in England, and only half the cases of intestacy (those where the nearest degree of heirs included more than one male) would afford any evidence in point. The field of Primogeniture in Kent has, therefore, long been narrowing, under the operation of the same cause which from the year 1200 has been extending it in the rest of the country—the rule of judicial presumption. Even in Charles II.'s time the process was already observable;† in 1740 Robinson declared that there was then nearly as much gavelkind land in Kent as before the disgavelling Acts began; and the evidence given before the Real Property Commissioners of 1830‡ went to show that the known sphere of Primogeniture in Kent was by that time quite as narrow as it had been four hundred years previously.§

* "Solement a teller le partibility del estate, per que mults families per division del lour estates fueront reduce a plus base degree."—Wiseman *v.* Cotton (1 Leon. 79).

† 1 Sid. 113.

‡ First Report, pp. 366 and 368.

§ But it is possible that the documents which we owe to the Record Commissioners may now serve in some cases to ungavel parts of these estates

It was not in Kent alone that Henry VIII. set himself to spread Primogeniture. In 1541, the year following his great Kentish statute, Primogeniture was established by 32 Hen. VIII., c. 9., throughout the Soke of Osweldbeck, in Nottinghamshire, the lands of which had hitherto been partible. Two years later it was carried into Wales.

The Welsh custom had been expressly assailed a little before this, when in 1536 the union of England and Wales was re-declared—(27 Hen. VIII., c. 26). Of course in the general extension of Primogeniture it could not fail to be noticed that the policy of Edward I. was out of date. Welsh patriotism had decayed. The Principality might safely be reorganised upon the English model. Accordingly, by 34 and 35 Hen. VIII., c. 26, s. 91, it was finally enacted that "all manors, lands, tenements, messuages, and other hereditaments, and all rights and titles to the same in any of the shires of Wales, are to be taken, enjoyed, used, and holden as English tenure to all intents, according to the common laws of this realm of England; and not to be partible amongst heirs male after the custom of gavelkind as heretofore in divers parts of Wales was used and accustomed." A memorial of that custom survived, however, to our own day, in the petty holdings of less than an acre, often found in Wales, mere fragments of a single field.*

This steady course contrasts vividly with the policy which postponed till 1777 the final establishment of Primogeniture in England's more westerly Keltic conquest. From the time of Henry's conquest of Erin, the English settlers had introduced within the pale their own system of descent; the written code which John is said to have deposited in Dublin was probably a copy of Glanville. But the Irish had retained the two systems of Tanistry and Partition, with which Mr. Maine's last work has made modern readers familiar. Both disappeared in James I.'s reign under the hand of the English judges; whom the imperative political necessity would have made indifferent

again. On this, and indeed upon the whole subject of Gavelkind, Mr. Elton's elaborate volume, "The Tenures of Kent," makes invaluable additions to the scantier materials of Somner, Taylor, and Robinson.

* Hansard, cxxxi. 485.

to the fact, could they have foreseen it, that a wider jurisprudence, "looking before and after," would detect in the one custom the germ of English Primogeniture, and in the other the germ of Kentish gavelkind. The partitive succession of the clansmen was declared an invalid custom in 1605; and two years afterwards the elective succession of their chieftains was similarly abolished. Henceforth the lands of the Sept, of its Canfinny, and of the English invader, must all descend alike by the rule of Primogeniture.

But the sun was to go back upon the dial. The uniformity thus created under the first Stuart was not to survive his dynasty. In the eighteenth century there were two nations in Ireland, for there were two religions. One ruled the other, and the rulers' aim was not the wealth but the poverty, not the consolidation but the disunion, of their subjects. The policy by which William had broken up the Saxons, and Edward the Welsh, was now adopted by the Protestant against the Catholic. By 2 Anne, c. 6, s. 10 (Irish), under the plea that the fear of disherison prevented the conversion of young people to Protestantism, the lands of Papists were made descendible among "all and every the sons share and share alike," unless the eldest son declared himself a Protestant.* The division was imperative, and no settlement or devise could prevent it. The family estate thus broken down could not be raised again by an ambitious son, for Papists were by the same Act (s. 6) declared incompetent to acquire lands by purchase. It was not until seventy years afterwards that, by 17 and 18 Geo. III., c. 49, all these partitions were abolished, and Primogeniture finally established throughout Ireland.†

Our survey has carried us throughout the lay freehold lands of England. But in one-third of England, if we may trust the calculation attributed to Lord Coke, the rise of

* Some writers seem to have overlooked the fact that this is not the restoration of the Irish custom, but an introduction of the Kentish one.

† Gans actually supposes the Keltic custom to be still in force in Ireland "Die Irische Sitte hat ebenfalls noch heute das Recht des Gavelkind behalten." ("*Das Erbrecht,*" IV. 368). This would be startling, if it were not that an *Edinburgh Review* (Vol. 40) seems equally at sea upon the subject.

Primogeniture remains still untraced by us. Copyhold lands, as we have already said, were not the subjects of an ownership that the king's courts would recognise, until the fifteenth century. Yet long before this the forbearance, or the policy, of the lords had accustomed them to permit the heir of the tenant in villeinage to purchase admittance to the lands of his deceased ancestor. By what step that custom spread from demesne to demesne we shall never know, unless before moths and worms have done their work the last great hiding-place of English law be explored, and the rolls of our manor-courts given to the hands of the printer. It suffices for our present purpose to know that the claim of inheritance had been conceded in nearly all manors —in some it remains to our own day formally unrecognised —at a time when it still could be asserted only by petition to the lord, and had no colour of legal right. Hence, when the Chancellor undertook—and, till the eighteenth century, no court but his did undertake—to enforce the claim as a right, he found systems of rules for the devolution of the claim already firmly established. It was inevitable, as we have seen, that schemes of descent growing up thus unconnectedly, the fruit of the prejudices or caprices of thousands of arbitrary lords should exhibit every eccentricity of rule. But the eccentricities had taken root too firmly to be eradicated. Lawyers contented themselves with a Præsumptio Juris, applying their own familiar system where no evidence of contrary custom appeared. By the side of manors which admit all the sons and all the daughters, manors which admit all the sons, manors which admit only the youngest son, manors which admit only the youngest of either sex, and manors which admit only the eldest of either sex, we find a predominant majority of manors where the rules of the common law hold sway. In our time, indeed, the Legislature has caused an extension of these rules to some few of the lands originally subject to the rarer customs. By the Copyhold Act of 1841 (4 and 5 Vic., c. 35, s. 79), it is provided that the lands included in any commutation made under its powers are "to cease to be subject to the custom of

Borough English or gavelkind or any other customary descent" (unless they are Kentish land), and to descend thenceforth like free and common socage. The lands that thus cease to follow the manorial custom nevertheless remain copyhold. Land that by enfranchisement ceases to be copyhold, of course ceases to be descendible by any copyhold custom, and must descend as socage. The Copyhold Act, 1852, s. 34, confirms this principle. The area of eccentric copyhold descent is steadily diminishing, in consequence of these enfranchisements and commutations; eight thousand of which have been effected by the Copyhold Commissioners, in addition to the numberless instances where the change has been carried out by lord and tenant alone.

A rarer kind of base tenure remains still for discussion, and it is one which curiously illustrates an important principle of juridical history. A constant peril of customary law is that of spontaneous depravation by false analogy;* as where sanitary rules swell into a ceremonial code, or class distinctions harden into caste. The peril is greatest when the custom is not of native growth, for among foreign surroundings the clue to its original principle is usually lost. Thus it was when in the sixteenth century the customary freeholders of Cumberland and the adjoining counties established their right of property against their lords. The tenant-right which had been their only advantage over the mere tenants at will now became a right to retain the land itself and to transmit it to their heirs. But to what heirs? The custom of Primogeniture, dominant among all other classes of landowners, was the natural model for their adoption; they adopted it. Thus, starting from the outset with the idea that priority of birth entitled one child to exclude the others, and knowing nothing of the causes which had created and had limited that rule, they naturally applied it universally. In the peaceful England of Elizabeth, there was nothing in the landowner's duty, either to lord or kinsfolk, that would emphasise the distinction of sex. The eldest son has a better right than his brothers. The eldest daughter must have a better right than her sisters. Had

* Maine, "Ancient Law," pp. 18—20.

not the good queen herself been wholly set aside by Mary? Just as the English judges, not knowing the history of the rules they were copying, excluded the consanguineous half-blood as well as the uterine; so the Northcountrymen, from similar ignorance, excluded the younger daughters as well as the younger sons. The exotic custom was extended by false analogy.*

It is probably to the independent operation of the very same cause that we owe the establishment of the same extreme form of Primogeniture in the Isle of Man.† There the tenants did not acquire a legal right of inheritance in lieu of their old straw tenure until the Act of Settlement, in 1703. Their intercourse with the mainland was too much with counties where, like Westmoreland and Lancashire, customary freeholds were little known, for us to suppose the Primogeniture of daughters to have been copied by them from Cumberland. In Holland the same abnormal rule prevailed; but the foreign influence which created it, operated not at the commencement but at the conclusion of the history of Inheritance Law. In Holland, Feudal Law never reached the same stages of development through which the Feudists elsewhere carried it; the Proper Feud remained to the last presumably intransmissible to females. But in the more modern grants it sometimes happened that the grantor expressly declared that females might succeed. The foreign custom prematurely forced in such cases upon Dutch law did not take the natural shape that it assumed in the foreign countries, and in the inferior Dutch lands, where it had grown up normally. There all females of equal degree inherited together. In the Proper Feud, Dutch law insisted upon Primogeniture, whatever were the sex of the heir.‡

With frankalmoign lands we have no concern. The

* Third Report of the Real Property Commissioners. Appendix, p. 4.

† Jeffcott's "Statute Laws of the Isle of Man," p. 116. In 1777 Primogeniture was extended to purchased lands, which had previously been treated as personalty.

‡ See Neostadt, "De Feudi Hollandici Successione," Lugduni, 1620, pp. 6, 15.

lands of a deathless owner lie beyond all laws of inheritance. But there remains for consideration one form of landed proprietorship transmissible to successors, though, unlike all of which we have spoken as yet, not transmissible in perpetuity. Unlike them, again, it is never transmissible by Primogeniture. Bracton* describes the writ of *Ejectio firmæ*, which had just been introduced for the protection of leaseholders. But his account is too brief for us to learn whether under that writ the land itself could in his day be recovered. Perhaps it was not until Equity set the example of specific restitution that the farmer's interest became a *jus in rem*. But whatever may have been the date at which the right to damages was raised into a right of property, the point of special interest to us is this—that the gradual transition from the one to the other so identified the two in men's minds that even when the property right had got thoroughly established, it still remained descendible like the personal rights, and never became subject to Primogeniture. In Scotland the lessee's *jus in personam* was in 1449 turned into a *jus in rem* by the operation of an express statute; and the suddenness of the transition made its real character apparent. The logical consequence followed; and to this day a term of years in Scotland is not a moveable right, but a heritable one—not partible, but Primogenitive.† The fact has not been without effect upon Scottish agriculture.‡

A survey of English inheritance law vividly illustrates the peculiarities of English feudalism. It has a stronger hold as a system of land tenure, and a weaker hold as a system of political life, than the feudalism of the Continent. In no continental nation was every inch of soil brought into feudal subjection; even Normandy permitted the *franc aleu* to exist, and in Scotland and Jersey a few allodial holdings

* Fo. 220.

† Erskine, "Principles of the Law of Scotland," p. 132.

‡ Lavergne, "Rural Economy of England," p. 289.

survive to this day, In no continental nation was Primogeniture so absolute in its operation or so general in its adoption; in England it left nothing for the younger sons, and it prevailed in every tenure. In no continental nation does Primogeniture still retain its hold as the typical rule of succession. In no continental nation are the lands, labour, and capital requisite for agriculture, still contributed by the co-operation of three separate classes. The rapidity with which our feudal law was developed was probably the cause of its peculiarity. But the Primogeniture with which William so deeply impressed it saved us from an aristocratic caste; as the centralising policy, which began in his Salisbury oath of fealty, saved us from aristocratic oppressions. The doctrine that only one son succeeds to the father's position saved us from an order of *gentilshommes* and barons of sixteen quarterings, and gave us a hierarchy of gentry and yeomanry, filling up every step of the gulf that lay void between the continental noble and the continental peasant. When such a policy was at work, it was natural that feudalism should be equally weak in the sphere of finance; that the *taille* should be unknown, and the tenths and fifteenths be levied impartially from all lands, knightly or pacific, base or free. It was natural that the liberty of alienation should be established unusually early, that entails should be introduced unusually early to replace it, and that they in their turn should be rendered briefer and weaker than in any other monarchy of præ-revolutionary Europe.

III.—The Successive Safeguards of Primogeniture.

We have now traced through every species of English land the history of Primogeniture—the rule by which an intestate's property descends to his eldest son. But there is a cognate subject which it may not be altogether out of place to deal with.

Under the phrase "Law of Primogeniture" popular controversy often assails the law of entail and the law of settlements. Absurd as the confusion may appear to a

lawyer, it is not unnatural to a lay observer. For the rareness of intestacy has long rendered the operation of the *law* of Primogeniture comparatively rare; and it is by settlements amongst the higher classes and by Wills amongst the middle classes that the corresponding *habit*—the aristocratic preference of eldest sons—is perpetuated into future generations. Let us trace the stages by which these have been admitted to supplement the operation of the law.

The Saxons had allowed a grantor of bocland to prohibit the grantee from aliening or devising it beyond the circle of his family.* The early Feudal law gave the heir still greater security by a general abolition of devises, and a prohibition of all alienations that were extensive enough to produce entire disherison.† By Bracton's time the prohibition was obsolete; but every fee simple conditional produced temporary inalienability. Meanwhile—about the same time that Primogeniture became predominant in socage lands—efforts were made by the lords to restrict alienation; and these, though intended for their own protection, protected the heir also. The Magna Charta of 1217‡ imposed a limited restriction, which in the case of tenants in chief soon became an absolute one, upon restrictions without licence. Bracton§ describes the mesne lords of his day as endeavouring to impose a similar absolute restriction upon their own tenants, but in vain. At the beginning of the reign of Edward I.—about the same time that Primogeniture became universal in socage lands—they changed their policy. They changed it in a manner doubly injurious to the heir. By the statute *Quia Emptores*,‖ of 1290, they not only gave up all power to restrict alienations, but they enacted that alienation should always take place in the mode by which the heir was most impoverished. Substitution was to supersede subinfeudation. No changes, however, took place in a statute of very opposite tendency, which they had passed five years previously in the interests of their own heirs. By this enactment, the *De Donis Condition-*

* Laws of Alfred. Stubbs' "Select Charters," p. 63. † Glanville, vii. 1.
‡ Cap. 39. § II. 19. ‖ 18 Edw. I., c. 1.

alibus,* a new species of estates in lands was created, which was placed beyond the possibility of alienation. Wherever a fee-tail was created, the eldest son now became indefeasible heir. No feoffment could oust his expectancy—no devise could oust it. Primogeniture was fastened upon all such lands with a chain of iron.

Much about the same time that the eldest son began to acquire a legal claim to copyhold inheritances, his hold upon freehold lands became relaxed. The fifteenth century saw Testaments reappearing through the operation of the law of Uses; and almost immediately after the Chancellor had thus recognised the power of devise, the Common Law judges legalised the employment of Recoveries for the destruction of entails.† From that century Primogeniture ceased to be an indefeasible right. By a Will the eldest son might be excluded from the succession to any estate in fee simple; and by the mode recognised in Taltarum's case, any fee-tail in possession might be converted into a fee-simple.

In Henry VII.'s reign a statute was passed to prohibit wives from aliening estates tail which had been given to them by their husbands (*ex provisione viri*). Such gifts at once became common; and long continued to be the chief safeguard of family estates.

All other estates tail, if vested in living persons, became freely alienable as soon as Henry VII.‡ dealt the last blow at baronial perpetuities by supplying, in the Fine, a means by which even an expectant tenant in tail might defeat the prospects of his heir. The subsequent destruction, by the Statute of Uses, of the power of devise was soon followed by its restoration in a simpler and more potent form than before.

Not many years, however, before the judicial recognition of Recoveries, the judges had permitted an innovation in conveyancing, which was destined in after years to be employed as a measure of protection against the peril of

* 13 Edw. I., c. 1.

† Taltarum's case was decided in 1473. Wills of Uses were first enforced in the preceding reign.

‡ Or Hen. VIII. See Butler's note to Co. Litt. 290b.

disentailment. In the reign of Henry VI. a contingent remainder was for the first time allowed to be valid. As soon as tenants in tail who were not in possession received the power of barring their estates by Fines, the ingenuity of conveyancers fell back upon these contingent remainders as aiding the postponement of that power.* The land which was to form a family patrimony was given, as to this day it is, to the living head not as an estate tail, but only as a life estate; and the remainder in tail was sent "in gremium legis" to await the birth of another generation. (Under the Commonwealth, the risk of attainder for treason led to the insertion of Trustees to preserve the remainder; and when powers of appointment were afterwards introduced, settlements finally assumed their present form.) There was no living man who could sell or devise the estate. It must inevitably become the property of the yet unborn eldest son; and not only until his birth, but until at, the age of twenty-one, he acquires the power of barring the entail, the land becomes an assured family possession, certain to pass from owner to owner in the very order in which a descent by Primogeniture would have carried it.. How far such an assurance could be carried remained a disputed point, but legal opinion has long settled that beyond the age of majority of the first unborn generation, the liberty of alienation cannot be restrained. As soon, however, as that age is reached, the existing entail is destroyed, and the estate resettled; and thus for generations each successive eldest son comes into his patrimony as an ascertained remainderman, and not under the law of Primogeniture.

IV.—The Effects of the Law of Primogeniture.

We have already sketched the military advantages which, as the Conqueror foresaw, resulted from the establishment of Primogeniture. The most apparent was the concentration of martial force. In war, as in diplomacy, silence and

* The earliest recorded precedents were drawn in 3 and 4 Philip and Mary. (See Mr. Joshua Williams' paper in the "Juridical Society's Transactions," I. 47, 48.)

secrecy are powers. The fewer the leaders who share or execute the counsels of a general, the more rapid and more direct will his operations be. The feudal army consisted of groups of tenants looking to their landlords, not of a body of soldiers looking to their one commander. Each man, in modern phrase, thought more of his colonel than of his general, and more of his regiment than of his cause. William reduced to a minimum the friction of the ill-hinged machine, and the embarrassments in which the conflicting interests, jealousies, and plans of his various barons incessantly involved their chief. But it was not only among the great vassals that military advantages resulted from the establishment of Primogeniture; they were perceptible in the very lowest ranks of the feudal army. The risk of a knightly feud devolving on an infant heir was reduced to its lowest degree, whilst in gavelkind succession it rarely happens that all the coparceners have attained majority. A further advantage of Primogeniture lay in its preventing that abbreviation of the period of service, which a subdivision of the knight's fee would have caused. Forty days were the limit of time for which each fee was bound to furnish its horseman yearly. In an age of bad roads and slow marches, so many days elapsed before the whole army could be gathered to the destined field, that but little margin was left for the campaign. A hundred years later, when Henry of Anjou had to defend a realm that stretched from the Orkneys to the Pyrenees, a six-weeks' soldier became worthless; and first by joint equipments, and afterwards by scutage, the whole system was broken up. But if the forty days were thus inadequate, what must twenty or ten have been? Yet when the knight's fee was subdivided, the necessary apportionment of the services could only be effected by a subdivision of their duration. The feudal levy from some great Honour would go in one generation for its forty days, and turn the fortunes of a war. Sixty years afterwards, if gavelkind prevailed in it, it would set out, quadrupled in numbers, for a ten days' march, and never reach the field in time to strike a blow.

We have already enumerated some political institutions which testify to this day William's foresight as a statesman. That as a general he was equally farseeing, he proved when he delivered his realm from the disintegrating law of gavelkind, which shattered the military strength of Wales and Ireland, where, like Cæsar's Britons, the Kelts to the last *singuli pugnabant, universi sunt victi.*

But in days of club-law it was not merely in the arena of national hostilities that Primogeniture was found a tower of strength. Even for local self-protection, and even among peace-living socmen, it had a part to play. Between the death of the great Norman and the accession of the Empress's son, there was many a time when in many a district younger brothers found themselves richer by their poverty. The wealth of the firstborn around whom they circled, was a far more powerful shield to each of them than his own apportioned share of it could ever have been. We have already seen how deeply the sad experience of a single century had engraved this lesson upon socmen's minds, when the great Justiciar wrote. Purparties were disappearing before Primogeniture.

The next age saw a change. Under the reign of law, the protection of Primogeniture was no longer needed by men of peace, and when armies of mercenaries could be hired with scutage money, it had no longer any influence upon the men of war. In modern England the possessor of an acre is as safe as the possessor of a county. No man is his own policeman. Henceforth, the only effects of Primogeniture upon English society—whether in early days, as an intestacy law, or in later ones as a custom of Settlement—are administrative, or economical.

When the Statute of Tenures completed the destruction of the feudal military system, the social and judicial organisations of England were still as feudal in their essence as they had been when that system was undermined five hundred years before by the Scutage of Toulouse. And when, in our own day, the creation of a citizen army formed another epoch in English military history, it found the pacific

organisation of the country feudal still. Our county taxation is not in the hands of a representative body, nor is our county judicature in the hand of a bureaucracy. In every agricultural parish there is a dominant and resident landowner, the centre of intelligence, of charity, and of social life. Upon a body composed almost exclusively of such men, the judicial and financial work of each county is devolved by our constitution. Hereditary public duty created an hereditary public spirit, which secured the due performance of all these functions, even in days less conscientious than our own. In a hard winter, when the porridge and the faggots had got scarce, the Gloucestershire peasants would ill have spared even Justice Silence and Justice Shallow; and we know that Squire Western was as zealous amongst the quorum as at the coverside. How invaluable the powers of such a position became, when they were exercised by an Allworthy, has been told by the great master of English life and feeling. Such men, independent of a Minister's smile or frown, formed the rallying points of English political life. In every generation our country has had her Hampdens, her Saviles, and her Althorps, the trained and trusted captains of proud followers, to lay their steady hands upon the helm of her fate. France, to-day, possessed of no leader with a visible stake in her prosperity, lies at the mercy of adventurous *avocats* and pressmen, whilst her peasant-proprietors doze in political lethargy through the intervals between the plébiscites.

Yet for these social advantages there was a social price to pay. It is as true in the parish as in the nation that a paternal government makes a childish people. A man whose brothers and neighbours are dependent upon him is prone to become overbearing, whilst the neighbours, and even the brothers, are apt to become obsequious. The effect of Primogeniture on national character could not be ennobling. The "statesman" of the Northern dales might love to scan his rights,* and the men of Kent might cherish the bold and

* To Wordsworth's pictures in poetry and prose add the estimate of a political economist—Alison, "On Population," II. 31.

boisterous spirit to which Jack Cade appealed, and which nerved them under Wyatt to shake Queen Mary's throne. But in the counties where tenantry and peasantry felt the influence of Primogeniture, there were no villagers less fabulous than those of Auburn, whom the Traveller could have found learning to venerate themselves as men. The next few years of our own time will show what feelings the leaders of agricultural trades unions may kindle among their followers. It is impossible to foresee how great a sedition a little fire may kindle amongst men who have no stake in their country. One thing at least is sure: an English revolution would be no mere change of dynasty, like the periodical revolutions which ruffle so little the even tenor of French life. It would strike at the very root of property and order, for on this side of the Channel we have not six million small proprietors with their hands on the throat of Communism.

There was also a penalty of a more palpable character to pay. In Portugal, where Primogeniture held greater sway than in any continental country, the blue blood of disinherited younger sons could not brook the touch of even sword or robe, and they preferred instead to live on casual alms. But in England, as in France, the *gentilhomme* was less proud, and the public purse more ample. There was always a pair of colours, a sloop, an embassy, or a benefice, for a portionless younger son. In days not altogether forgotten by living men, an overgrown diplomatic service, excessive armaments, and a secularised and simoniacal Church, attested to the world the presence of Primogeniture in England.*

This darker side of the picture naturally suggests an inquiry into the general effects of Primogeniture upon national wealth. With reluctance we approach a question which Mr. J. S. Mill has declared to be "one of the most disputed in the whole range of political economy." The

* There is extant in the Probate Registry a nobleman's will, bequeathing to his three younger sons annuities of £600 until they should receive Government places exceeding that value.—"Hansard," cix. 1210.

controversy lies between the partisans of small properties and small farms, and the partisans of large properties and large farms. Two other conceivable combinations may be dismissed from notice. The division of large properties into small farms is defended by no economist; though the lesson was not learned until that system of tenure had desolated Ireland with famine.

> "Westward where Dick Martin ruled
> The houseless wilds of Connemara,"

the landlord's estate was vast enough to allow of his porter's lodge being built twenty-five miles from the hall door;* and the tenants' holdings were smaller than a French peasant's. The second arrangement, that by which small properties are combined into large farms, though sometimes adopted in parts of France,† can never become general. The whole spirit and feeling of small proprietors is opposed to it, while the farmer would find it attended with economical difficulties, which—I say it with hesitation—seem to have escaped the notice of Mr. Mill. Had that great writer lived in the country, he perhaps would not have revolutionised English thought, but he might have learned by sad experience that contiguous fields will command a monopoly rent, and that scattered fields can only be cultivated at a profitless expenditure of the time of men and horses.

If, then, we have small properties, we must be content with small farms; if we have large properties, we must have large farms. A large farm means, of course, one that is large as farms go, though small in comparison with the size of properties, for no one supposes the possibility of a great English landowner finding the time and the capital necessary for the cultivation of a great English estate. The results of the controversy that has raged between the advocates of these two systems may perhaps be fairly summarised now. The "English" system of large estates subdivided into large farms, a system which can exist only under Primogeniture, is the system by which the greater *net* produce is realised, by which, with equal expenditure of

* Lavergne, p. 290. † Mill's "Political Economy," I. 365-6.

manual labour, the greater profit is won from the land; and by which a hierarchy of agricultural classes is created, rendering possible an order of capitalist farmers, the equals of their landlords in manners, taste, and culture. The "Continental," or old Kentish, system of small farms tilled by the owners gives the greatest *gross* produce. Greater profit is won from the land, but it is won by a more than proportionate expenditure of labour. "The magic of property," as Arthur Young found in France, "turns sand to gold." It has raised to fertility the blowing sands of the Pays de Waas; through it the Lilliputian farms of Belgium have received a Lilliputian minuteness of culture, which has made their country the garden, now that it is no longer the cockpit, of Europe. There is no day and no moment when a man, whose land is his banker, cannot pay in something to his own credit. Even when "endimanché," Jacques Bonhomme will slip away from estaminet or mass to keep an eye on the vines or the beetroot. And though political economists may care little for an increase of produce that is eaten up by the men who cause it, the statesman looks at matters from a wider view. To the "wealth of nations" equal profits are of equal value. To the statesman seeking the weal of nations, the profit that remains after a vast population of busy and contented toilers have satisfied their wants, is a thousand times more precious than an equal profit left by agricultural skill and clever machinery, after the payment of competition wages to a minimum number of half-fed and improvident labourers. Yet, as we have seen, either France or England may contrast favourably with the Irish system—*infandum renovare dolorem*—under which the nation obtained the smallest net as well as the smallest gross produce, and the cultivator, besides being improvident and ill-fed, always smarted under a sense of injustice.

The drawback of the peasant proprietor's position lies in the very excess of the industry to which it urges him. The material welfare which he gains, and the assiduity with which

he pursues it, deter him from mental cultivation and from moral enthusiasm.*

These are not abstract theories, nor examples vaguely compared by the "Method of Agreement." Try them by the "Method of Difference" in its strictest application. Go where capital, labour, climate, soil, and government are all alike, and only the land tenure different; that difference will always tell. Devonshire has the climate of Jersey and a better soil; but Devonshire has the law and custom of Primogeniture, whilst the Jersais give only a préciput to the eldest son.† The consequence is that Jersey, with larger exports, maintains a population four times as dense as that of Devonshire, thrice as dense as that of Great Britain.‡ Compare again the gavelkind county with the other shires of England. Kent lies at the worst edge of that great clay basin of which London is the centre, in the

* See "Letters of Edward Denison, M.P.," pp. 149, 150.

† The exact rule in Jersey is that the eldest son, or eldest daughter failing sons, first takes the house and garden (and in the country two acres of land), a tenth of the remaining land, and a further plot as allowance for his liability to pay "musket money" to the militia. Partition then takes place, every son taking twice a daughter's share.—Le Quesne's "Constitutional History of Jersey." See also the Report of the Royal Commission, 1871.

‡ Jersey, like Kent, had her period of reaction towards Primogeniture. In 1616, and again in 1666, the "States" petitioned the Crown for a law to permit entails upon eldest sons, and to make all Fiefs of Dignity descendible by Primogeniture. They alleged that the latter change "would be a fondation of men to serve the king and the country in the greatest offices and charges, and a constant surety and ornament to that island;" whilst by the former "the island shall be always provided of sufficient men able to maintain muskets and other serviceable arms for defence, and carts for his Majesty's service, whereof there is now a miserable defect." They pleaded that "the infinite partitions do wholly impoverish the people, and leave not men in any measure able to find arms or much contribution for defence, or to do his Majesty and the country any good service. And the children of the better sort, depending upon their partitions, give not themselves to trades; and so by suits for portion and idleness an inundation of beggary diveth upon the island." Modern history has shown that the poverty which they deplored sprang not from Primogeniture, but from the laws which limited prices and prohibited exportation. The attempt to divide Jerseymen into seigneurs and serfs soon came to an end. But to modern lawyers, accustomed to associate French law with the policy of the Code Napoleon, which recognises no preferences of age or sex, it seems strange to find a patriotic jurist of Jersey, Le Geyt, denounce the attempt as the work of a traitor "imbu des maximes de France" (II. 506).

soil most refractory and most unprofitable before modern days of drainage and grass-farming set in.* Yet in the England of the Tudors it was already a proverb that

> A squire of Cales, and a knight of Wales,
> And a laird of the north countrie;
> A yeoman of Kent with his yearly rent
> Would buy them up all three.

Lambard,† in the sixteenth century, "perambulated" Kent, and pronounced that "the common people or yeomanry is nowhere more free and jolly than in this shire." But after his time a new era commenced in the distribution, and therefore in the cultivation of the land. Arthur Young, two hundred years afterwards, found Kent one of the best cultivated counties in England; and Lavergne, in our own day, pronounced it superior to its neighbours, Surrey and Sussex, although its soil is less favourable than theirs. But these testimonials of excellence show that the excellence was decaying as its causes decayed. In Young's time there were still nine thousand freeholders in Kent,‡ besides all the estates that lay in mortmain. The example of other counties and of the upper classes of Kent was superseding the law of gavelkind by a custom of Primogeniture, whilst irresistible economical causes were concentrating land in the hands of rich purchasers. Hence it is not surprising that in the "New Domesday" of our own day, though the law of gavelkind still holds, the lands of Kent are found not more subdivided than those of other counties. If we include the mortmain lands, they are even less subdivided; for there are in Kent 7758 properties of upwards of an acre in size, which gives an average to each of about 122·53 acres, whilst the average in the rest of England proper is only 116·7, or in the rest of England and Wales about 122·48§ (London

* Lavergne, "Rural Economy of England," p. 199.

† "Perambulation," p. 8. ‡ Hasted, I. 301.

§ The exact disproportion is still more in favour of Kent, for the above averages are reckoned on the *total* acreages; since the acreage owned by proprietors who own less than an acre is not distinguished in the "Landowners' Return." From the nearness of Kent to London, house property is so frequent that this class of proprietors are more numerous than in the rest of England, in the ratio of about seven to six.

being omitted in all the calculations.) Kent contains thirteen mortmain estates of over 1000 acres each.

The introduction of Primogeniture into Wales by Henry VIII. was a severe blow to the economical progress of the Principality. In a country where wealth was still purely agricultural, there was but a scanty portion of personalty for each younger child; the eldest had only an equally scanty one wherewith to stock all his land. An age of poverty and discontent set in, and Rebecca with her riotous sons stalked through the land. Had not the sudden developement of her mineral resources in railroad days opened a new field for the enterprise and industry of Wales, she would have sunk to the level of Ireland; and English politicians would have discovered additional evidence of the innate impracticability of the Kelt.

The *Edinburgh Review* (in an article attributed to Mr. MacCulloch) prophesied in July, 1824,* that if the system of partible descents should "be supported in its present vigour for another half-century, *la grande nation* will certainly be the greatest pauper warren in Europe, and will, along with Ireland, have the honour of furnishing hewers of wood and drawers of water for all the other countries of the world." A sufficient commentary on this prediction was furnished forty-eight years afterwards by the subscribers to the loan which redeemed the soil of France from the hands of her invaders. In July, 1872, M. Thiers asked for £140,000,000, and received in reply the offer, mainly, though not entirely, from France, of £1,720,000,000.

But the conclusion which we may form on the respective merits, political or economic, of large properties and of small ones, will throw little light on the modern aspects of the law of Primogeniture. It is quite true that there are legal causes which tend to keep English estates from increasing in number; and which, whenever the number is lessened by a large proprietor buying out a small one, keep it down to its narrowed limit. But in the face of the misap-

* XL. 369.

prehensions and misnomers of popular controversy, it is of the utmost importance to make it clear that of all these restrictive causes the law of Primogeniture is beyond comparison the least influential. It is not a frequent thing for the owner of real property to die intestate; and it is one of the rarest of casualties for the owner of a large estate to die without having made either a settlement or a will. Very small, therefore, is the total extent of land which in the course even of a generation descends under the law of Intestacy (largest, probably, in proportion, if we may trust Parliamentary witnesses, in the districts where Primogeniture is unknown).* That concentration of property, which in our earlier feudal days certainly was preserved and intensified by the law of Primogeniture, has for centuries depended for its support upon other branches of our jurisprudence. It is by the laws of Entail and Settlement that the estates of the great proprietors are preserved from alienation. It is either under a Settlement or under a Will, it is as a remainderman or a devisee and not as an heir, that an eldest son usually receives his right to his father's lands. These laws do the work that once was done by the law of Primogeniture. At the same time it is true as matter of history that the mode and purpose of their operation are due to habits of thought and feeling which the law of Primogeniture created, and which, probably, would be seriously weakened by its abolition.

It must also be remembered that besides these legal causes which keep the number of landed proprietors from increasing, there are economical causes at work to diminish that number. Ambition for the social distinction attached to the possession of a landed estate raises the price of large properties, and the "earth-hunger" of busy townspeople raises the price of small ones, until the value of land grows out of all proportion to its rental. Hence the yeoman finds that by retaining his few acres he locks up a capital which if turned into money would stock a farm of ten times the

* First Report of Real Property Commissioners, pp. 253, 271, and 368.

size, and would yield in profits fourfold what it now saves in rent. There are laws of human action less sublime, but scarcely less unerring than those of the planetary movements. In a time when wages and prices are rising much faster than agricultural profits, it is not surprising that every day sees some dignified estate rounded off, and some small proprietor turned into a tenant farmer. Land-owning is now a luxury, not a livelihood.

We are justified, then, in concluding that upon the interests of the country at large the law of Primogeniture exercises no appreciable influence at the present day. Its operation is so rare, that we may dismiss from consideration those national effects which once were so tremendous, and regard only the results which it produces in the limited circle of family life. Tested on that small scale, its effects are too evident to leave much scope for controversy. It is, as Lord Houghton calls it, "a little pin point of a law;" but its prick is a keen one.

In the vigorous days of feudalism, the eldest son's pre-eminence was far more marked in his duties than in his rights. It is, as Mr. Maine says, not likely that he "had any advantage over his brethren and kinsfolk in occupations, interests, or indulgences." But when his armed hand was no longer needed by either king or kinsmen; when the rent services came to be paid in gold instead of in blood; and, most of all, when it was replaced by an excise duty, and cast upon the whole nation; then his privileged position assumed the shape of an injustice. In the old Primogeniture, neither the father nor the younger sons had seen any real inequality of provision; in the new Primogeniture, there was an inequality whose grossness, to those sons at any rate, was evident enough. Young soldiers and Templars were not like Ben Jonson's thresher—

> "Who can stand
> With a huge flail, watching a heap of corn;
> And, hungry, dares not taste the smallest grain,
> But feeds on mallows, and such bitter herbs."

Hence arose family animosities, especially in times or countries where neither commercial nor colonial life had been

sufficiently developed to furnish a field for the energies of the disinherited. On this subject the testimony of Coleridge* is emphatic:—

"The mournful alienation of brotherly love occasioned by the law of Primogeniture in noble families, or, rather, by the unnecessary distinctions engrafted thereon, is still almost proverbial on the Continent, especially (as I happen to know from my own observation) in the South of Europe; and appears to have been scarcely less common in our own island before the Revolution of 1688, if we may judge from the characters and sentiment so frequent in our elder comedies."

"The firstborn," says Locke,† "has not a sole or peculiar right by any law of God and nature." Observers of more sophisticated or less sophisticated minds may couch the sentiment in a different phraseology. The fact remains that few parents could deliberately dispose of their property as the English law will dispose of it for them, and that few heirs could accept in its entirety the "insolent prerogative" which the English law confers upon them, without exciting the surprise and reprobation of their neighbours. A father would be considered to disregard all the responsibilities of parentage, if he did what the law does. The disposition that was not unreasonable, when land was weighted to the full with seignorial burdens, becomes flagrant injustice when land is of all forms of property the most privileged and prized. A law so violently opposed to the moral sentiment of the nation, remains in life only because it remains in lethargy.

The main reason for this disapprobation is evident. The disposition of the law disappoints the prevailing expectation of the children. The rule of Primogeniture and the power of testation have not eradicated the principle of a Legitim. Even amongst the upper classes of this country the custom of Primogeniture has never been adopted in that exclusive shape which it wears in law. The lands which are settled on an eldest son are always charged

* "Literary Remains," I. 191. † "Of Government," I. 92.

with portions for his brothers and sisters; portions, too, which are made to carry interest at a higher rate than that which the rental of the land returns.

Among smaller proprietors the usual dispositions of land are still further removed from Primogeniture. The factory, the farm, the row of villas, which the father has made the investment of his capital, are turned at his death into a provision for all his children as impartially as the money itself would have been. Thus the law of Intestacy disposes of real estate in a mode utterly different from the private dispositions that are made amongst any class of Englishmen, except, indeed, by incredibly undutiful fathers, or by the fathers of incredibly undutiful families. A solicitor instructed to draw such a disposition would be bound, by professional honour, to remonstrate with his client.* And this disposition is of a peculiarly evil character. It accumulates wealth upon the child who has already had most opportunity of acquiring it, and for his benefit not merely diminishes but destroys the shares of those whose youth has less fitted them, or whose sex has disqualified them, for providing a livelihood for themselves. The evil of having different laws of succession for land and for money reaches its height in days like our own when either is so readily convertible into the other. An estate is bought because it was going at a low price; but if the precaution of devising it is forgotten, the younger children are left destitute in consequence. "Distressing cases of this kind," says Lord St. Leonards,† "are continually happening." (In the Isle of Man this danger was prevented, by treating all purchased lands as personalty.) Does a man lose the moral obligation to provide for his children by merely taking his money out of Consols and putting it into bricks and mortar, or by exchanging his leasehold street for a freehold one? It may be urged that the brotherly affection of the eldest son will prevent his taking full advantage of the law. But it must be remembered that he will in many cases be an infant, legally incompetent

* Cf. the evidence cited in Hansard clii. 1122.

† Handy Book on Property Law, p. 11.

to waive, even by his guardian's consent, a tittle of his rights.

To say that the rule of absolute Primogeniture disappoints the expectation of children, implies of course that in the vast majority of cases it disappoints the intention of the father. He knows, indeed, that he has made no will as yet, and he knows what must be the result if he do not make one. Rarely, indeed, does he desire that result. He is firmly resolved to make a will, but, as every solicitor knows, the association of a will with an approaching death is so strong in most men's minds, and so repellent, that the prudent purpose is deferred from day to day, and often until too late. Or if the will is made, but made invalidly, the result is as fatal; and our Reports testify that it is not only by the "Country Schoolmasters," whom the Northern Circuit used to toast, that inadequate forms of execution have been prescribed to clients. It is quite true that it is "only from accident or carelessness" that these disappointments arise. But in neither case are the children to blame for it. There is no reason why the law should turn the accident into a calamity, or make the father's carelessness equivalent to his cruelty. Moreover, a man's intestacy may arise from absolute legal incapacity to make a Will. It is rather hard for the majority of his children to be deprived of their fortunes, merely because their father died insane. Where law operates, it should operate for justice, not for injustice, assuredly not for desolation. "Law," said Hamilton, "should govern accidents, not lie at their mercy." Its single aim should be, to do what the mischance has left undone. If the State makes a Will for a man, it should try to make the same Will that he would have made for himself. If it cannot discover, or cannot approve, his intentions, it has only one alternative—to try to make the same Will for him that he ought to have made for himself. Neither of these courses would lead it to our absolute Primogeniture. As the Real Property Commissioners wisely reported, "The distribution of property which, in the majority of cases, a prudent

owner would himself direct, must be considered the proper distribution to be made upon intestacy by the law."* It is certain to be the distribution most generally expected, and it bids fair to be the distribution most generally just. This can never be said of our present law of intestacy Moreover, by an unhappy coincidence, the class amongst whom intestacy is most frequent is the very class to whose intentions the law of intestacy is most repugnant. Great landed proprietors, whose wills and settlements are based on a qualified Primogeniture, are in constant communication with their lawyers, are familiar from their earliest manhood with the idea of posthumous disposition of their property and almost never die without having, by settlement or will, provided for each and every child. Middle-class proprietors often die intestate, though seldom intentionally. Peasant proprietors usually die intestate deliberately, too ignorant of the cruelty of the law to know that they leave their wives and daughters destitute; and peasant proprietors are a vast body at the present day, when Building Societies and Freehold Land Societies have dotted our manufacturing districts with hundreds of thousands of tiny tenements. The law of Primogeniture does not often take effect, but when it does, it is almost invariably in families where, even in a qualified form, it would be unwelcome, and where there is least of consequent family dignity or of moveable wealth to mitigate the impoverishment it causes.†

V.—The Probable Future of the Law of Primogeniture.

This picture of the effects which Primogeniture produces at the present day prepares us to suppose that it has long been on the verge of abolition. For forty years past, efforts have been made in the House of Commons to repeal it, but in vain. The law of mediæval military inheritances still

* Third Report, p. 12.

† For authentic instances of the misery sometimes caused by the existing law of Primogeniture, see Hansard cxxxi. 475; cliii. 477; cxcvii. 1826, 1849; ccxxx. 594.

governs all English lands in the last quarter of the nineteenth century.

By what arguments has the change been resisted so successfully?

The name of argument can scarcely be bestowed on the plea that Intestacy is too rare for the change to be worth making. If the law is to operate even once, it is worth while to make its operation just. Yet the Attorney and Solicitor-General of 1836 considered that plea sufficient reason for rejecting the proposed reform. Sir John Campbell declared that the bill "would produce no effect," and Sir R. M. Rolfe that it "would be perfectly nugatory." Sir Robert Inglis, however, whilst concurring in opposing the bill, took a remarkably different view of its potency, declaring that "the real question is, whether the House of Lords is to be overthrown or destroyed!"* That a law of partible descent would operate very rarely is quite true. The stamp returns show that, even of personal property, ten times as much passes under wills as under intestacy. But it must needs operate just as often as does the existing law to which the opponents of change attach so much importance.

Scarcely compatible with the last-mentioned argument is the one which, probably, has most effect in creating opposition to a law of Partible Descent—the fear that it would "cut up properties" too minutely. It must be conceded by the most zealous friends of the *petite culture* that there is a point at which subdivision ceases to be economically beneficial—the point at which the *parcelle* becomes too small to occupy the whole time of its proprietor. That point has been reached and passed in many inheritances in France, for the shares often do not exceed a rood in extent, and 1,134,490 French proprietors are eking out a livelihood by their wages as day labourers.† It must also be admitted that, rare as intestacy is, it is amongst the small proprietors that it most frequently—disproportionately frequently—occurs. (We have, indeed, insisted upon this fact as a main

* Hansard xxxii., 906.

† Foreign-office Report, Parliamentary Papers, 1870, vol. lxvii., pp. 59-69.

argument against the existing law.) It is therefore inevitable that, here and there, inheritances would be found in which each coparcener's share would not exceed those which Mr. Watkins occasionally heard of in manors with a gavelkind custom, and which did not suffice to defray the fines for the heir's admittance. (But we need not fear that, even in the poorest and most prolific families, subdivision would go on to the same extent as in that Cingalese inheritance which Bishop Heber* was assured had been cut up into the one hundred and fifty-fourths of a single tree.) Kentish cases are on record where one property was split up into one hundred and forty-fourths; and another, not worth more than £300, was divided among twenty-nine coparceners.†

It may, however, be confidently asserted that very minute rights of inheritance would be far too rare to produce any appreciable waste of the agricultural labour-power of the nation. But without insisting upon this, it is sufficient to remark that, when such rights arose, they would hardly ever be exercised by an actual partition, but would almost always be bought out by one of the sons. Some of the children will be too young to undertake the duties of a cultivating proprietor; whilst most of the older ones will be settled in other districts, or in other callings, which they cannot profitably quit. Hence, as experience abundantly shows, in countries of partible descent a custom may grow up by which the eldest home-keeping son buys out the rights of the other children, and prevents actual partition, long before the estate has reached the point at which further subdivision would be excessive.‡ Sometimes, indeed, this custom takes such deep root that, as in Wurtemburg and Silesia, the younger children not only acquiesce in being bought out, but habitually content themselves with a price considerably below the market value of their legal share.§

* Alison, II. 5.

† First Report of Real Property Commissioners, app. p. 270.

‡ In Jersey, "an arrangement is usually entered into whereby the eldest son purchases from his co-heirs their portion of the land, and the estate is thereby kept together; and it is remarkable how, notwithstanding the law which divides property among co-heirs, estates have remained in the same family for several generations." Le Quesne, *Constit. Hist. of Jersey*, p. 290.

§ Foreign Office Report of 1870, pp. 80, 133.

It has been urged that Primogeniture contributes materially to the increase of national wealth. The energies of the younger children, it is said, are stimulated by their poverty; and the stimulus is additionally heightened by the spectacle of their elder brother's luxurious existence. Those who advance this argument can scarcely have remembered the sex of the heir whom Primogeniture selects for the career of luxury. It remits to poverty the whole of the daughters; though society allows them no honourable means of raising themselves to competence or station, however keenly the pressure of poverty may dispose them to the task. It paralyses with riches a member of that sex to which ambition and enterprise are not forbidden, and selects the very member whose age and experience would best have fitted him for the perilous pursuit. The defenders of Primogeniture who lay so much stress on the advantage of "depriving a man of every adventitious assistance,"* and regard broad English acres as a *damnosa hæreditas*, may fairly be asked why the eldest son, too, should not obtain this advantage, and surrender his lands to public uses; or why the advantage now conceded to the younger sons should not be intensified, by relieving them of the adventitious assistance with which they are encumbered by the Statutes of Distribution. A man of energy and business habits may, indeed, make his share of personalty a stepping-stone to fortune; but the education and prejudices of younger sons of the upper classes will seldom lead them to turn their portions into capital for merchandise or manufacture. Their pittance secures them from want, and serves to eke out the meagre incomes of the more aristocratic professions. Glasgow and Liverpool, Manchester and Birmingham, may be searched far and wide without finding any great proprietor's younger son distinguished as a manufacturer or eminent as a merchant. *On ne s'encanaille pas.*

It has been said that the hope of founding a family is the main incentive which urges our leading capitalists to repeated enterprise. Were the prospect withdrawn from them of

* *Edinburgh Review* xl., 363. See a reply in the *Westminster Review*, vol. ii.

being able to "make an eldest son," the mere love of money, or the mere excitement of business, would soon cease to sustain them in their anxious career. Let the enterprises of England's merchant princes be remitted, and she sinks to her old state, a bleak and sunless island in the North Sea. We need not pause to consider whether the position of a mere millionaire is really so unattractive as to be of itself no stimulus to the ambitious spirits on 'Change. For, granting to the full the force of the argument we are considering, admitting it conclusive as a justification of the law of Entails and of Testation, it has little value as a defence of Primogeniture. No capitalist that ever resolved to found a family, ever dreamed of trusting to the law of Primogeniture to effect his object. He taxes to the utmost the skill of conveyancers in drawing assurances to perpetuate the *éclat* of his name. Declare such efforts void, prohibit gifts to the unborn, abolish Wills, entitle every child to an indefeasible *légitim*—in a word, repeat the policy of the 17th Nivose—and the ambition of the capitalist may really be in peril. But it is the height of absurdity to suppose that a man who has set his heart on founding a family, and on making a fortune for that purpose, will relax his efforts merely because he learns that if a particular contingency which depends solely on his own will, and which he has always resolved to prevent, be not prevented, his hopes will suffer disappointment. A man inured to the hazards of Mark-lane, or the perils of Capel-court, will scarcely be unnerved by so remote a chance as this.

A sounder objection is drawn from the evil of cutting up those estates which support titles of nobility. Such estates so very seldom come under the operation of the law of Intestacy, that the evil would be most rare. But the independence of all life-long legislators is of too great importance to the State to permit the abandonment of even its smallest safeguard. Were the law of Primogeniture to be wholly abolished, an exception should be made in favour of the heirs of Peers. This provision of a distinct law of inheritance for noble classes marked many of the feudal systems of

jurisprudence, and commended itself to the mind of Napoleon. He qualified the equal divisions which the Revolution had prescribed, by conceding to senators the right of creating *majorats* for their eldest sons.

A further point remains to be considered—whether the abolition of the law of Primogeniture would cause the decay of the custom of Primogeniture. The direct operation of that law is so rare that the warmth with which all attempts to alter it have been made and have been met, show that the debaters felt it had some remoter effect more potent than those upon which they avowedly laid stress. At heart the assailants hoped, and the defenders feared, that any change in the law of Intestacy would be followed by a corresponding change in men's customs of disposition. It may appear unlikely that an ancient and deeply rooted prepossession should be undermined by the passing of a statute which in no way deals with it, and which will operate upon only a minute fraction of the total number of the landed estates of the country, and upon an extremely minute fraction of their total extent. But the power of law in moulding public opinion is too constant not to operate even here. To believe, to imitate, and to obey, are instinctive impulses in the human mind. "*Melior est dispositio legis quam hominis*," is not a mere pedant's crotchet, but the natural presumption of all citizens. They will assuredly copy, sooner or later, closely or loosely, whatever principle they see the State adopt and honour. Even the seeming exceptions confirm this law of history. If legal establishment has failed to make Presbyterianism aristocratic in Scotland, or to make Kentish settlors and testators adopt the principle of partibility, it is not because law does not mould opinion. It is because it moulds it so irresistibly that all local rules are powerless against the influence of even an extraneous system, if it be felt to represent 'the State's collective will.'

From the day when Jefferson carried the repeal of the Virginian law of Primogeniture, the principle of partibility took root in American jurisprudence. It prevails now in every State and Territory of the Union. So universally

has public opinion, even amongst European immigrants, been moulded by the present law, that all private dispositions are made in accordance with it; and a parent would be reprobated by his neighbours if he enriched one child at the expense of the others. "There is only one family in the State of New York which has had the boldness to disregard this popular feeling."* It would, however, be a much harder task to change the current of opinion on this subject in aristocratic England. Even those who most strongly approve of the effects which the law of Primogeniture has had in moulding our private settlements, need not desire its preservation for the mere sake of preserving these effects. Practices so inveterate will not be undermined by a collateral innovation so slight, if they really possess one-half of the political and social advantages which their admirers claim for them.

Some change in the law we may pronounce to be inevitable. The remarkable survey of the land tenures of Europe† which was made a few years ago by our diplomatic agents, at the bidding of the Foreign Office, shows vividly the utter opposition of the English law of inheritance to the general judgment of civilised mankind. *Securus judicat orbis terrarum.* Here and there by extraordinary local customs, as in parts of Silesia and Darmstadt—or by extraordinary *privilegia*, enacted for favoured individuals, as in Austria—Primogeniture of the English type may be found lingering on the European continent. But an iceberg in the Gulf Stream is scarcely rarer or more durable. The Consular reports show that the system of equal division is as popular as it is general. Nowhere is any desire expressed for its abandonment. Even the most questionable of its results—

* Speech of Mr. Beresford Hope. Hansard clii., 1146. See also Brougham's "Statemen," ed. 1845, vi. 59; and Washburn's "American Law of Real Property," Bk. 3, ch. 2. It is amusing after the lapse of more than two hundred years to read the lines in which old Taylor, in his work on Gavelkind (p. 27), recommended that custom to the English plantations in America, and bade them "examine of what avail in probability and policy it might be to them; and in particular to that most famous plantation of Virginia, the most fertil and most consonant to English bodies of any whatever, and will prove of greatest use in time to the English nation."

† Parliamentary Papers of 1870, vol. lxvii. See also those of 1871 and 1872.

the *morcellement* of estates—is reckoned usually a national advantage.

Forty-eight years ago, Gans, completing his survey of the laws of Inheritance in all ages and nations, marked with astonishment the unique survival of mediæval jurisprudence in England. He predicted the speedy repeal of the Corn Laws, and, in its train, the abolition of that system of inheritance "whose rigid feudal organisation is out of harmony with our time and its tendencies."* The prophecy was sagacious. The Corn Laws have passed away, and our law of descent has been stripped of many of its mediæval peculiarities. Half-blood kinsmen and lineal ancestors have entered into their rights; but the younger children's claim of kindred is not yet allowed.

Eight times since has that claim been urged within the walls of Parliament. In 1836† the debate, which commenced the new campaign, took place on the "Landed Property of Intestates Bill," by which Mr. Ewart proposed to make undevised real estate vest, like personalty, in the executor or administrator, and be distributable by him among the next of kin. Leave to bring it in was refused by 45 to 29. His motion was renewed in the following April,‡ and defeated by 54 to 21. Fourteen years elapsed, and the struggle was revived by Mr. Locke King. In 1850 he introduced the subject in one clause of a motion on the transfer of Landed Property, which was defeated by 110 to 52. In 1854 he proposed a Parliamentary inquiry into the law of descent —a proposal which, in the somewhat premature judgment of Montalembert, "neither found an echo nor left a trace." His "Succession to Real Estate Bill" was rejected by 203 to 82.§ In 1859 the second reading of his "Real Estate Intestacy Bill" was lost by 271 votes against 76.‖ In 1866 he reintroduced the Bill, and was defeated by 281 votes against 84;¶ but was more successful in 1869, when he obtained a majority of 25, having 169 ayes against the 144 noes of his opponents.**

* Gans' "Das Erbrecht," Stuttgart, 1824-1829, vol. iv.

† Hansard xxxii., 898. ‡ Hansard xxxvii., 734. § Hansard cxxxi., 506.

‖ Hansard clii., 1157. ¶ Hansard clxxxiii., 1975. ** Hansard cxcvii., 1863.

When Mr. Locke King lost his seat at the last election, Mr. T. B. Potter took up the cause. His "Real Estate Intestacy Bill" was discussed on June 28th, 1876, and the second reading was negatived by 210 to 175.*

This series of defeats will not discourage those who remember the history of Romilly's attempts to reform far graver errors in our law. That the current of opinion no longer sets as strongly as it did in favour of Primogeniture is sufficiently shown by a comparison of the earlier and later Parliamentary divisions. Further evidence of it appears in the fact that though the Real Property Commissioners of forty years ago recommended the abolition of gavelkind in favour of the common law, and a bill for the purpose was introduced into Parliament, no such measure would be attempted at the present day. Six years ago a Royal Commission collected evidence as to the nature and working of the partible descents of the Channel Islands, and reported —"We do not consider that it would be desirable to alter the law of succession to real estate in Jersey."† It may safely be said that if gavelkind ever be abolished—as is much to be desired—it will be in favour of a more impartial, not a more unjust, system of descent. Nor is it unworthy of notice among the advantages of the reform which is here recommended, that it would afford an invaluable opportunity of terminating all those local peculiarities of descent, which serve only to introduce doubts into titles and complexity into conveyances, breeding litigation, and rendering land unmarketable.‡

Reformers have hitherto attempted to supersede Primogeniture by the simple plan of assimilating the succession laws of realty to those of personalty. Such a plan, conferring rights upon the whole group of children, necessarily involves, as in the case of personalty, the appointment of a single successor, from whom purchasers may take their con-

* Hansard, ccxxx., 606. † Report of 1871, p. 13.

‡ An instance is given by the Real Property Commissioners—First Report, p. 170—of a single house whose site was partly freehold, partly copyhold, and partly leasehold. The owner died intestate; the concurrence of the eldest son, the youngest son, and the executor became necessary for its conveyance.

veyances, and be relieved from the difficulty of tracing out all the members of a family, and the expense of securing the concurrence of them all in the deed. This simple and logical plan introduces no new rule, but merely relieves our code from the complexity of a double system of Succession Law, making it deal with freehold lands just as it has dealt for six hundred years past with leasehold ones. Yet, as we have seen, it is doubtful whether, so long as our political constitution remains based upon the distinction between the Second and Third Estates, a corresponding distinction must not also be preserved in our system of inheritance. Let it be freely admitted that there is no reason in the nature of realty why it should not be made to descend by the rules which govern the distribution of personalty; yet we would urge that, in any attempt to effect that desirable reform, there is an absolute political necessity for exempting from distribution all estates which otherwise would descend, unsevered, to support the rank and independence of a peer of England.

It may further be admitted that in the partible descent of the lands of commoners, grave social and economical ends would be furthered, with little disadvantage to the younger children, and that the probable preference of the deceased father would be consulted, if statutory provision were made for the eldest son to have the option of purchasing the real estate at its market value. Such purchases have been found frequent wherever a system of partition is in force. In Jersey local institutions exist which facilitate them—there being in each parish six official appraisers permanently appointed to effect all *partages*. In Wurtemburg it is the duty of the *Schultheiss*, or parish magistrate, to assess the price at which the eldest son may redeem the land.*

A third provision may be suggested—that, to prevent excessive *morcellement*, no estate should be actually partitioned if it were so small that the purparty of each child would amount only to (say) two acres or less. It might be made the duty of the executor to sell such an estate by

* Foreign Office Report of 1870, ii., p. 80.

public auction, unless it were redeemed from him by one of the children themselves. This provision would satisfy the fears of many of the opponents of the proposed reform; but the experience of English leaseholders, as well as of Jersey peasants, seems to show that the same end may be sufficiently secured by the common sense of the coparceners themselves. In France, however, public opinion now sets in favour of a law of this kind; and in Belgium such a law exists, awarding all minute inheritances to the eldest son, and charging him with pecuniary portions for the other children.*

It may, indeed, without grudging the blessing which old Plowden invoked upon "the amending hand," be questioned whether the Parliamentary efforts that we have enumerated were not made upon too sweeping a plan. Between the artificial injustice of the present Primogeniture, and the theoretical simplicity of the proposed reform, there lies a mean; a mean which has the advantage of satisfying the chief requisite of a good Intestacy law, for it represents the prevailing practice of men who do not die intestate. Akin in its relative estimate of children's claims to that principle of a Préciput, which obtained such general acceptance in mediæval times, it effects the apportionment in a manner more in harmony with the varied requirements of children in an age of busy commercial enterprise, and also with the exigencies of modern conveyancing. We refer, of course, to the everyday plan of giving the whole estate to the eldest son, but charging it with pecuniary portions in favour of the younger children. This course, familiar to every conveyancer, has once already within these kingdoms been embodied in legislation. It was established for the lands of conforming Papists, by that statute of 1704, which has already been cited. It is enacted by 2 Anne, c. 6, s. 10 (Irish), that—

"In every case where such eldest son shall be intituled as aforesaid by reason of his being a Protestant, such real estate shall be chargeable and charged with such sum and sums of money for the maintenance and portions of the daughters and younger sons of such Papist as

* Ibid., p. 128.

the Court of Chancery shall direct and appoint to be raised for them, and shall be raised and paid according to such directions, such portions not to exceed the value of one-third part of such estate."

The Primogeniture of feudal France was, except in Normandy, usually qualified in this way. Similarly in Kent; the copyholds of the manor of Eleham descend to the eldest son; but the Homagers assess the value of the land, and the heir must pay each younger son the price of his aliquot share.*

No stronger proof of the safety of such a rule can be given than the fact that it is sanctioned by the authority of the most strenuous and scientific of the defenders of Primogeniture, large properties, and entails—the late Mr. McCulloch. He fully admits that—

"The same rule should be adopted in distributing the property of those who die intestate, which experience has shown as most advantageous in the making of wills. When, therefore, there is a landed estate, it should go to the eldest son, being, however, burdened with a reasonable provision for the other children."†

This mode of reform has the further merit of preserving the mother's inheritance to her children, and not making the widower absolute owner, as the law of Personalty would do. It is a question of detail, lying beyond the limits of the present essay, whether the Legislature should fix the exact proportion which the younger childrens' portions must bear to the whole value of the land; or should fix only the maximum and minimum proportions, leaving the actual proportion in each case to be settled by the High Court of Justice (or in successions of small rateable value by the County Court judge), upon consideration as well of the respective amounts of the personal and the real estate, as of the public or merely private position to which the eldest son had succeeded. The necessity of supporting a Peerage would, of course, form a weighty reason for lessening the charges to be imposed on the land; whilst a Primogeniture of this qualified character might well be allowed to supersede the present system of female coparcenery when a Peerage descends to one of several daughters.

* Hasted, viii. 97. † *Political Economy*, ed. 1843, p. 267.

And now to bring to a close our task. We have described an early age in which Primogeniture was unknown in England. We have described a further age in which the pressure of new social necessities introduced it with so steady and resistless an advance, that it became at last a distinctive peculiarity of England. We have found that those necessities have disappeared, (as the objects which Primogeniture was intended to secure have ceased to need its aid); and that Primogeniture itself bids fair to follow them ere long Finally, we have ventured to suggest the outlines of a law more in harmony with modern life. *Tempora mutantur, nos et mutamur in illis.*

APPENDIX.

NOTE A.

P. 8.—"*Too scanty to be worth partition.*"

The importance which considerations of the *size* of estates may have in determining the law of inheritance is vividly illustrated by the custom of some manors, where "the land is gavelkind if it exceed a particular value; if less, it is borough English." (First Report of the Real Property Commissioners, p. 254.)

NOTE B.

P. 16.—"*The Laws of Henry I.*"

The erroneous reading which has thus seriously obscured the history of English Primogeniture, was probably derived by Hale from Lambard's *Archaionomia* (Cambridge, 1644; p. 203). Henry's supposed "Laws" are there reprinted from the Exchequer MS., with the reading "Primum" for "Primo."

NOTE C.

P. 17.—"*The son who shall take the rooftree.*"

Some readers may propose to explain these preferences, shown to a particular son in partitive descents, upon a different principle, and interpret them by Sir Henry Maine's Oriental illustrations (Early Institutions, p. 197), as being merely a reward given to that son for his impartial distribution of the family patrimony. Such a principle did, in fact, establish a "reconnaissance de primogeniture" in the Jersey law of personalty; and Le Geyt, seeing this (I. 309), conjectured that the same motive might, to a limited extent, have contributed to the establishment of the eldest son's préciput in realty. But that explanation is, I venture to think, sufficiently refuted by the law of Normandy, under which (Terrien, book vi., chap. 3) the youngest son is the apportioner of the lots, yet it is to the eldest that the mansion house is given.

NOTE D.

P. 51.

The law of Intestacy, so rarely operative in England, has largely influenced the economical condition of Jersey. For in that island

wills of land were unknown till 1851 ; and as regards lands acquired by descent, they are still only partly legalised.

Note E.

P. 57

The testimony of Mr. Nassau Senior is emphatic. "I have made thousands of wills and settlements, and not one in a hundred was based on any principle but that of equal partition." (*Fortnightly Review*, Oct., 1877, p. 539.)